ECORD
AND
RIEFS

No. 15-214

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

BRIEF FOR RESPONDENT ST. CROIX COUNTY

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QUESTION PRESENTED

Petitioners own two adjacent lots of land that border a nationally designated wild and scenic river bisected by tree-lined bluffs. Each lot is "substandard" because neither lot alone meets a county zoning ordinance's minimum buildable acreage requirement for residential development due to flood risks and other topographical challenges. An exception that lifts that buildable acreage restriction on lots applies to commonly owned, adjacent lots only after the buildable acreage on the substandard lots is combined. As a result petitioners are permitted to build one residence on their two lots, but not a separate residence on each lot, and neither lot can be sold as a separately developable lot.

The question presented is whether a court, in reviewing a regulatory takings challenge to a county's application of its minimum buildable acreage requirement to two commonly owned, adjacent substandard lots, may assess the economic impact of the zoning requirement by comparing the value of the two lots with one residence to the value of the two lots with a residence on each lot.

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioners Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver. The respondents are St. Croix County and the State of Wisconsin.

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BRIEF FOR RESPONDENT ST. CROIX COUNTY

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.

The relevant statutory and regulatory provisions are reproduced in part in the appendix to the petition

(Pet. App. D1) and fully reproduced in the appendix to this brief (App., *infra*, C1-C28, D1-D4).[1]

STATEMENT

A. The St. Croix River: Geography And Historical Significance

1. Petitioners own 2.52 acres of land, originally platted in 1959, as two adjacent lots. The lots border the St. Croix River in St. Croix County, Wisconsin, and are nestled within the lower St. Croix River Valley. The Valley's lifeblood is the St. Croix River, named the

[1] This regulatory takings case represents a second round of litigation following an earlier round involving the state courts' rejection of petitioners' application for a variance. Although the Wisconsin Court of Appeals below relied significantly on that first round of litigation in their rulings on review here, the certified record in this case (and therefore the Joint Appendix) does not include many documents relevant to that first round of litigation. Because those documents seemed potentially helpful to the Court's review and are not otherwise readily available, they are included in an appendix to this brief, with the express acknowledgment that none is formally part of the certified record in this case and the Court may choose to discount them accordingly. The documents include the state court of appeals ruling in the initial round of litigation (App. A), the trial court ruling in the initial round of litigation (App. B), relevant excerpts from the County zoning ordinance in effect at the time of petitioners' application for a variance in 2006 (App. C), earlier versions of the County ordinance (App. D), an excerpt from petitioners' appellate brief in the initial litigation (App. E), and petitioners' original variance application with the County Board of Adjustment (App. F). Appendix G is the Wisconsin Circuit Court's denial of rehearing in this case, which is part of the record.

"*rivière de Ste. Croix*" in 1689 by the French commander Nicolas Perrot, a "picturesque waterway of 164 miles in length that flows steadily through eastern Minnesota and northwestern Wisconsin, eventually merging with the Mississippi River." *United States v. Bradac*, 910 F.2d 439, 440 (CA7 1990); *see* Harold Weatherhead, Westward to the St. Croix, vi (1978) (describing the history of "Naming the St. Croix").

Early settlers captured the beauty of the St. Croix River Valley in their writings. As described by one settler in 1803, "[n]ature is here calm, placid & serene, as if telling man, in language mute, indeed,—not addressed to the *Ears*, but to heart & Soul: It is here man is to be happy." Richard Bardon & Grace Lee Nute, *A Winter in the St. Croix Valley, 1802-03*, 28 Minnesota Hist. 225, 235 (Sept. 1947). Ray Stannard Baker, an American journalist, muckraker, and historian, grew up in the valley. In his memoir, he described how the river shaped his childhood: "[T]he geological interest of the St. Croix Valley * * * helped to lure me, as it lured many another boy of our town, to the exploration of the wild gorge through which the turbulent waters dropped in foaming rapids from the broad and placid river above the town to the rock-guarded Dalles below. Day or night, all my boyhood, the sound of roaring water was rarely absent from my ears." *See* Ray Stannard Baker, Native American: The Book of My Youth, 116 (1941).

Wisconsin and Minnesota have long faced the challenge of preserving the St. Croix River's great

beauty and essential navigability while promoting industry and economic development. For much of the nineteenth century, the St. Croix Valley was synonymous with forestry, particularly pine lumbering. *See* William G. Rector, *The Birth of the St. Croix Octopus*, 40 The Wisconsin Magazine of History, 171, 171-77 (1957). During the 1800s, wheat increasingly rivaled lumber as a St. Croix Valley export and competed for the River's use. In 1865, Horace Greeley boasted of the area, "the cry is Wheat! Wheat! * * * Every steamboat goes down the river with all the wheat on board that she will take, and a couple of wheat laden barges fast to her side." *See Wheat on the Upper Mississippi*, Sunbury American, Oct. 28, 1865, at 1.

2. After World War II, the river's aesthetic beauty and the area's proximity to Minneapolis-St. Paul led to rapid residential development in the towns bordering the St. Croix River. *See* Osh Andersen, et al., *Transformation of a Landscape in the Upper Mid-West, USA: The History of the Lower St. Croix River Valley, 1830 to Present*, 35 Landscape & Urban Planning 247, 264 (1996). A plan in the 1960s to build a coal-fired power plant along the St. Croix River galvanized a citizen campaign to preserve the St. Croix River and to protect the land bordering the river from accelerating and seemingly uncontrolled development. *See* Kate Hanson, *The Wild and Scenic St. Croix River*, 25 The George Wright Forum 27, 27-28 (Issue 2, 2008). In response to these specific concerns and similar concerns expressed about threats to other great rivers in the nation, Wisconsin Senator Gaylord Nelson championed

congressional passage of the Wild and Scenic Rivers Act in 1968, Pub. L. No. 90-542, 82 Stat. 906, which designated the Upper St. Croix River one of only eight rivers deserving immediate national protection "as components of the national wild and scenic rivers system" and placed under the control of the Secretary of the Interior. *Id.* § 3(a)(6), 82 Stat. 907-08; Hanson, *The Wild and Scenic St. Croix River*, *supra*, at 28. Soon thereafter, Minnesota Senator Walter Mondale joined Senator Nelson in persuading Congress to enact further legislation, the Lower Saint Croix River Act of 1972, Pub. L. No. 92-560, 86 Stat. 1174, to include the Lower St. Croix River within the protections of the federal law. Hanson, *The Wild and Scenic St. Croix River*, *supra*, at 29.

The new law designated the upper 27-mile stretch of the Lower St. Croix River a federally administered scenic river and provided that the lower 25-mile stretch of river could immediately qualify for protection upon application of the Governors of Wisconsin and Minnesota and approval of the Secretary of the Interior. Pub. L. No. 92-560, § 2, 86 Stat. 1174. At the request of both States, the Secretary of the Interior approved the inclusion of the lowest portion of the St. Croix River as part of the National Wild and Scenic River System and confirmed that it would be "administered by the States of Minnesota and Wisconsin." Lower Saint Croix National Scenic Riverway, 41 Fed. Reg. 26236, 26237 (1976).

B. State of Wisconsin And St. Croix County Land Use Planning For The Protection Of The Lower St. Croix Riverway

1. The Lower St. Croix River Act of 1972 required the Secretary of the Interior, along with Minnesota and Wisconsin agencies, to develop a "comprehensive master plan" to jointly manage the 52-mile tract of the Lower St. Croix Riverway. Pub. L. No. 92-560, § 3, 86 Stat. 1174. Accordingly, in 1975, the National Park Service, Wisconsin Department of Natural Resources, and Minnesota Department of Natural Resources published their first "Master Plan" for the Lower St. Croix River. Nat'l Park Serv., Minn. Dep't of Nat. Res. & Wis. Dep't of Nat. Res., Master Plan: Lower St. Croix National Scenic Riverway (1975) (reproduced at 40 Fed. Reg. 43240, 43240-58 (1975)).

The State of Wisconsin enacted its legislation implementing the 1972 federal legislation in 1973. *See* St. Croix River Preservation, 1973 Assemb. B. 1242, ch. 197, Wis. Stat. § 30.27 (1973). This statute authorized the Wisconsin Department of Natural Resources to promulgate regulations, including standards for the "issuance of building permits" and the "establishment of acreage, frontage and setback requirements" for the "banks, bluff, and bluff tops" of the river. Wis. Stat. § 30.27(2). Section 30.27 further mandated that all counties within the riverway adopt zoning ordinances that comply with these standards. *Id.* § 30.27(3). To that end, the Wisconsin Department of Natural Resources in 1975 created a set of rules—Chapter NR 118—which established baseline standards for local

zoning ordinances, including minimum buildable acreage requirements; exemptions from those requirements for certain types of pre-existing lots; and variances based on an applicant's showing of unnecessary hardship. The new rules became effective on January 1, 1976. Wis. Admin. Code § NR 118 (1976).

2. In response to NR 118, St. Croix County amended its zoning ordinance to include a "Lower St. Croix Riverway Overlay District," which mirrors all the detailed requirements for local ordinances set forth in NR 118. *See* Cty. Zoning Ord. § 17.36 (App., *infra*, C5-C22). The County has continued to update its zoning ordinance to reflect subsequent changes by the Wisconsin Department of Natural Resources in NR 118.[2] The County zoning ordinance sets forth its general and specific purposes. They include, but are not limited to "[r]educing the adverse effects of overcrowding and poorly planned shoreline and bluff area development"; "[p]reventing soil erosion and pollution and contamination of surface water and groundwater"; "[p]roviding sufficient space on lots for sanitary facilities"; and "[m]inimizing flood damage." Cty. Zoning Ord. § 17.36.B.1.a. The primary listed purposes

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[2] Unless otherwise expressly noted, references in this brief to the St. Croix County zoning ordinance refer to the ordinance as it existed at the time of petitioners' 2006 application for a variance at issue in this case. *See* note 1, *supra*; App. C, *infra*. Although the relevant substance of the ordinance for the purposes of this case has remained largely the same since, its structure and its section numbering have changed significantly in several parts.

also include "maintaining property values." *Id.* § 17.36.B.1.a.5.

As required by NR 118, the St. Croix County zoning ordinance requires that a lot contain at least one acre of "net project area" to be a "building site." *See id.* § 17.36.G.1.b. "Net project area" is in turn defined to exclude land that is not suitable for building, including "slope preservation zones, floodplains, road rights-of-way and wetlands." *Id.* § 17.09.135. The County zoning ordinance also tracks NR 118 by including an exception for lots pre-dating NR 118's effective date. The exception sets forth specific conditions that must be met for a landowner to be allowed to build or sell a substandard lot:

> Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> 1) The lot is in separate ownership from abutting lands, or 2) The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. *Adjacent substandard lots in common ownership may only be sold or developed as separate lots*

> *if each of the lots has at least one acre of net project area.*[3]

Id. § 17.36.I.4.a (emphasis added); *see* Wis. Admin. Code § NR 118.08(4). The County ordinance, accordingly, distinguishes between owners of pre-existing substandard lots who also own adjacent, substandard lots and those who do not. The former are eligible for an exception from the minimum buildable acreage requirement only after the buildable acreage available on each of the adjacent lots is combined.[4]

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[3] The original 1975 version of the St. Croix County Zoning Ordinance for the St. Croix Riverway, like the version of NR 118 then in effect, included the same limitation on providing pre-existing substandard lots with a special exemption from the minimum building acreage requirement: the exemption was available "provided that lands abutting the parcel in question are not under ownership or control of the applicant * * *." St. Croix Cty. Zoning Ord., St. Croix River Valley Dist., § 3.10.8 (1975), App., *infra*, D1. But neither originally included the further explicit statement, added in July 2005 to the County ordinance and in 2004 to NR 118, that "[a]djacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area." Cty. Zoning Ord. § 17.36.I.4; Wis. Admin. Code § NR 118.08(4). It is not disputed that the County in practice applied the same restriction on separate sale and development prior to the 2005 amendment, based on its interpretation of the earlier language. Petitioners have never raised any claim in either round of litigation related to the 2005 change in language.

[4] The language of the County zoning ordinance, like the identical language of NR 118, could be read to mean that an owner of two adjacent substandard lots that in combination still lack the one acre of buildable acreage could not construct one building on the two sites but an owner of one substandard lot with less than one acre could. Characterizing such a reading as "seemingly absurd" (App., *infra*, A8 n.9), the state court of appeals in the earlier

Finally, the County zoning ordinance also allows for variances based on a landowner's showing of "unnecessary hardship." Cty. Zoning Ord. §§ 17.36.J.2, 17.70(5)(c)(3). To establish "unnecessary hardship," the applicant for a variance must demonstrate to the County's Board of Adjustment that "special conditions affecting a particular property, which were not self-created, have made strict conformity with restrictions * * * unnecessarily burdensome or unreasonable in light of the purposes of this ordinance. Cty. Zoning Ord. § 17.09.232.

C. The Denial Of Petitioners' Request For A Variance From The Minimum Buildable Acreage Requirement

1. Petitioners own 2.52 acres of beachfront land bordering the Lower St. Croix River, which they received as a gift from their parents through two conveyances in 1994 and 1995. Pet. App. A3, B1. Petitioners' parents purchased the property in the early 1960s as two separate lots, both recorded in 1959. J.A. 82. The St. Croix River runs across the northern border of both

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litigation in this case assumed the validity of the contrary view, advanced by the County, that the exception would be available to the owner of the two adjacent substandard lots, allowing the construction of a building on either lot, or straddling both lots even though the combined acreage of the two lots together still fell below the one acre minimum threshold. *See* note 10, *infra*. It is now common ground in this litigation that "[t]here is no dispute that [petitioners'] property suffices as a single, buildable lot under the Ordinance." Pet. App. A12.

lots; each is roughly rectangular in shape, sits perpendicular to the river, and is bisected by an exceedingly steep slope leading to a bluff. *See* J.A. 60 (aerial photograph of both lots). For the purpose of this litigation, the parties and the courts below refer to the eastern lot as "Lot F," which is 1.25 acres, and the western lot as "Lot E," which is 1.27 acres. J.A. 29-30. *See* Pet. App. A2 n.1.

Soon after purchasing Lot F in 1960, petitioners' parents transferred ownership of the lot to Murr Plumbing Company, which they owned. They also built a small summer recreational cabin on the lot less than 100 feet from the river's ordinary high water mark. Pet. App. A3; App., *infra*, B2. In 1963, the parents purchased Lot E. Pet. App. A3. And, in 1982, Murr Plumbing Company conveyed Lot F back to the Murr parents. Lots E and F, accordingly, were first in common ownership in 1982.[5]

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[5] The state courts below mistakenly assumed (Pet. App. A3, A17, B2, B7) that the two lots did not come under common ownership until 1995: that is, after the Murr parents conveyed Lot E to petitioners, having previously conveyed Lot F to petitioners in 1994. The courts' mistaken assumption appears to derive from the omission from petitioners' complaint of the 1982 transfer of Lot E from Murr Plumbing Company back to petitioners' parents. The complaint refers to the 1960 transfer to the plumbing company and neglects to mention the 1982 reconveyance. *See* J.A. 6 (Complaint ¶ 11). In its briefing before this Court, petitioners continue to perpetuate that error by claiming that "[i]n 1994, the [Murr] parents transferred title to Lot F (the cabin parcel) from the plumbing company to their six children" (Pet. Br. 4), and by making legal arguments based on that factual assertion (*id.* at 31).

2. The property's terrain presents a challenging site for development. The petitioners' lots are bisected by a very steep, nontraversable slope, running east-west and leading to a 130-foot tall bluff. App., *infra*, B2; *see* J.A. 60 (aerial photograph). There is some moderately level land both above and below the bluff, but the land at the bottom is sharply constrained for development by the river to the north and the bluff to the south, which is why many other riverway property owners have located their houses at the top of the bluff. Because, moreover, the land's northern border extends to the river's ordinary high water mark, much of that

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Petitioners' arguments directly contradict their express acknowledgment of the 1982 reconveyance in the initial round of litigation before the state court of appeals: "For the sake of full disclosure [Lot F] was transferred from William Murr Plumbing, Inc. back to William and Margaret Murr in 1982. That transfer was not detailed at the board of adjustment hearing, and appellants share this information out of candor to the court." *See* App., *infra*, E3 n.1 (quoting Brief of Petitioner-Appellant-Cross Respondent Donna J. Murr). The County has since confirmed the accuracy of petitioners' disclosure based on the County's independent examination of the records maintained by the County Register of Deeds. That the lots came under common ownership in 1982 rather than in 1995 means that the Murr parents could not, consistent with the County zoning ordinance restrictions on commonly owned, adjacent substandard lots, have conveyed Lots E and F to separate persons in 1994 and 1995. The state court of appeals below, unaware of this fact, assumed the contrary (Pet. App. A17), but the validity of its judgment does not turn on the correctness of that assumption. Should the Court reject our position that affirmance is warranted based on the existing record and remand to the state courts for any reason, those courts will be free then to consider the legal relevance of the 1982 transfer in the first instance.

land below the bluff lies within the St. Croix River's floodplain. *Id.*; J.A. 29-31.

3. Petitioners and their parents have used and enjoyed the two lots in combination since becoming owners. They have used the lot adjacent to the cabin for swimming, camping, and parking. They also created a volleyball court there. Neither they nor the parents ever treated them as distinct parcels in their day-to-day use of the lots.[6]

In 2004, petitioners contacted the County about possibly floodproofing or otherwise modifying their summer recreational cabin. J.A. 76. The cabin constitutes a nonconforming structure because it was built before current development restrictions were in place and it does not meet their standards, including the required 200-foot setback from the ordinary high water mark. *See* Cty. Zoning Ord. § 17.36.G.5.c.1. Because the cabin is located in a floodplain, it has been repeatedly and significantly damaged by floods over the years. Pet. App. A4; J.A. 100-02.

The Petitioners were reportedly "flabbergasted" (J.A. 93) to learn that because of restrictions on residential development on land bordering the St. Croix River—that had been in place since 1975—they were limited in their ability to modify their existing cabin

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[6] *See* Deposition of Joseph Murr, 47-48 (reproduced at Cert. Rec. Docket No. 18, pp. 69-70); Deposition of Peggy Murr Heaver, 9 (reproduced at Cert. Rec. Docket No. 18, p. 75). It is accordingly inaccurate for petitioners to assert that they "never treated their two parcels as a single economic unit." Pet. Br. 29.

and otherwise to construct new developments on Lots E and F. Although petitioners retain options to floodproof and improve their existing cabin under the zoning restrictions, they can do so without obtaining a variance only so long as they remain within the cabin's current footprint, limit improvements to less than 50 percent of the existing home, and floodproof in particular ways. They cannot, however, significantly expand the cabin's footprint or move the cabin within Lot F absent a variance. *See* J.A. 68; Cty. Zoning Ord. §§ 17.36.I.2.c, 17.40.G.3, 17.40.H.1.b.5-6, 17.40.H.3.a. In addition, because each lot lacks the one acre of buildable acreage required by the County zoning ordinance since 1975, petitioners require a variance to build a house on each lot or to sell either lot separately as a developable lot. *See* Cty. Zoning Ord. § 17.36.G.1.b.

4. In 2006, petitioners applied to the County for a variance from the minimum buildable acreage requirement. J.A. 61-62.[7] Although formally labeled an application for a "[v]ariance" to use both lots as "separate building sites" (J.A. 62), petitioners acknowledged that their application would "be better characterized as an appeal of the zoning office's interpretation" that

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[7] When petitioners first applied in February 2006, their application included a request to "redraw the lot lines," merging portions of Lots E and F into two new lots: one lot below the bluff and a second lot above the bluff. *See* App., *infra*, F34. But they subsequently amended the application in May 2006 by eliminating this proposal in favor of using the two lots "as separate building sites." J.A. 62 (Item #1).

their property was subject to the minimum buildable acreage requirement. *See* App., *infra*, E2.[8]

5. The County Board of Adjustment denied petitioners' application, rejecting their argument that their two lots should not be considered commonly owned for the purposes of applying the minimum buildable acreage requirement. J.A. 61-73. The Board further concluded that denying the variance would not constitute "unnecessary hardship" entitling petitioners to a variance "because it would not deprive the[m] of reasonable use of their property since their contiguous substandard lots can be developed and sold jointly as a single, more conforming parcel that is more suitable for residential development." *Id.* at 65.

The Board also detailed the significant harm that would result from granting the variance. *Id.* at 66. By allowing an additional residence that failed to meet minimum standards in an area already threatened by overcrowded development, the Board stressed, the County's ability to prevent harmful soil erosion, avoid contamination of surface and ground water, minimize flood damage, and maintain property values would be seriously undermined. The adverse effects of lifting a prohibition on construction would also be effectively permanent and ongoing. *Id.*

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[8] Petitioners also sought five other variances and two exceptions from other restrictions—triggered primarily by the substantial floodplain and exceedingly steep slope on their land—that limited their ability to build a new, larger home on Lot F outside the current footprint of the existing cabin. J.A. 62-63.

6. Petitioners filed a lawsuit challenging the Board's interpretation of the applicability of the minimum buildable acreage requirement to Lots E and F, and both the state trial court and the state court of appeals upheld the Board. App., *infra*, B1-B7 (trial court ruling), A1-A15 (appellate court ruling). The appellate court concluded that the ordinance applies to all commonly owned, adjacent substandard properties, "regardless of when they come under common ownership." *Id.* at A2.[9] The court further agreed with the County that petitioners could build a new home on their pre-existing two lots based on the lots' combined net project area, which was still below the one-acre minimum buildable acreage requirement. *Id.* at A8 n.9.[10]

Finally, the appellate court defended the reasonableness of the exception's distinction based on whether the owner of a substandard lot also owned an adjacent substandard lot. The court explained that its

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[9] The trial court reversed the Board's denial of the other variances and exceptions related to reconstruction of petitioners' existing home on Lot F. App., *infra*, B4-B6; *see* note 8, *supra*. The court of appeals subsequently reversed the trial court's ruling on those additional issues (App., *infra*, A12-A15), which are not at issue before this Court.

[10] "[S]ignificant to [the court's] interpretation of the [ordinance's] manifest intent" was its "assumption" of the correctness of the County's view that the ordinance should not be read to provide that a person could build if she owned only one pre-existing substandard lot with less than one buildable acre, but could not build if she owned two contiguous, pre-existing substandard lots with less than one buildable acre. *See* App., *infra*, A8 n.9; note 5, *supra*.

interpretation was "consistent with the manifest intent of the ordinance and [NR 118] to preserve property values while limiting environmental impacts." App., *infra*, A9. As described by the court, the exemption for substandard lots sought to ensure that "[w]hen the provision became effective, every person who already owned a lot could still build." *Id.* at A10.

For those who owned only a single lot that "was too small [to build] under the new rule," it "was acceptable" to make an exception so they "could still build on their lot or sell it as a developable lot" because otherwise their property value might be completely destroyed. *Id.* But where, as in this case, "the substandard lot owner owned an adjacent lot as well, then the lots were *effectively merged* and the owner could only sell or build on the single larger lot." *Id.* (emphasis supplied). Unlike the owners of a single isolated substandard lot, the owners of adjacent substandard lots, like petitioners, did not require a blanket exemption to avoid the possibility of having their property values completely destroyed. *See id.* Providing them instead with a more limited exemption better "preserved both property values and the environment." *Id.*

D. Petitioners' Regulatory Takings Claim

1. Following the state courts' rejection of their claim that the minimum buildable acreage requirement did not apply to their land, petitioners filed this regulatory takings challenge in state court. J.A. 4-10. They contended that the County's denial of petitioners'

ability to develop or sell Lot E separately from Lot F amounted to an unconstitutional taking of Lot E absent the payment of just compensation. *See id.* at 9-10 (Complaint ¶¶ 34-42).

2. The trial court granted the County's motion for summary judgment. Pet. App. B1-B10.[11] The court found that there was no genuine issue of material fact that petitioners retained "use and enjoyment of their property despite the denial of the variance." *Id.* at B9. They had options to reconstruct and floodproof the existing cabin within its current footprint or, if petitioners preferred the new, larger house contemplated by their application, to replace the cabin with such a house on top of the bluff located on either lot or straddling the two lots. *Id.* The court further noted that "the market value of the property has not been significantly impacted by the denial of the variance to separately sell or develop the lots." *Id.* The difference between the market value of the larger lot with one home and the

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[11] The trial court also granted the County's motion on the additional, independent ground that petitioners' takings claim was time-barred as a matter of state law. *See* Pet. App. B6-B7. The state court of appeals affirmed the trial court's summary judgment ruling without reaching the statute of limitations issue (*see id.* at A7). That potentially independent and adequate state law ground in support of the judgment is accordingly not before this Court but would be available for the state court of appeals' consideration, along with a ripeness defense the County raised but the appellate court did not reach, should this Court decline to affirm and remand the case to the state courts.

two lots each with their own home was less than ten percent: $698,000 instead of $771,000. *Id.*[12]

3. The state court of appeals affirmed. Pet. App. A1-A18. The appellate court "agree[d] with the circuit court that the challenged regulatory action, an ordinance that effectively merged the Murrs' two adjacent, riparian lots for sale or development purposes, did not deprive the Murrs of all or substantially all practical use of their property." *Id.* at A1-A2. The state court of appeals also agreed with the trial court that petitioners could "continue to use their property for residential purposes," including the option of replacing their existing summer cabin with a new, year-round residence "entirely on Lot E, entirely on Lot F, or it could straddle both lots." *Id.* at A12-A13. In concluding that there was no "genuine issue of material fact" that the "property decreased in value by less than ten percent" (*id.* at

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[12] The trial court relied (Pet. App. B9) on the County's expert who explained in detail why the reduction in value was relatively small. *See* J.A. 15-60 (property appraisal by Scott R. Williams). While Lot E has about 100 feet of waterfront, Lot F has only 58 feet (*id.* at 32-33), which is less attractive to purchasers of higher end homes in the area. However, the combination of 2.5 acres and 158 feet of riverfront, provided by the ordinance's merger of the two lots, would allow for the construction of the larger, more elaborate, and expensive residence that is popular along the riverfront. *Id.* at 47-59; Affidavit of Scott Williams, 41 (Cert. Rec. Docket No. 17, p. 17-49) ("[T]here is no question that most buyers would prefer to have wider lots with more frontage * * * , more privacy, more elbow room, and higher prestige."). The trial court also found petitioners' expert failed to raise a genuine issue of material fact regarding reduction in value because the testimony failed to consider the value of both lots together and because it was not based on "information as to the effect on fair market value." *See* App., *infra*, G3-G4.

A15-A16), the court of appeals relied on both the Wisconsin Supreme Court's opinion in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), and the fact that the County zoning ordinance had "effectively merged" petitioners' two commonly owned, substandard adjacent lots. Pet. App. A1, A3, A17.

SUMMARY OF ARGUMENT

The state court of appeals correctly considered the value of petitioners' land with one residence on petitioners' two adjacent substandard lots in comparison to the value of the land with one residence on each lot in ruling on summary judgment that the County's application of its minimum buildable acreage requirements to petitioners' property did not constitute a regulatory taking. Petitioners contend that the court below erred because it should instead have measured the value of the lot that they allege was taken based on its sale or development potential on its own, without considering its sale or development potential when combined with the adjacent, substandard lot that petitioners also own. But this Court's precedent provides no support for such a fictional measure of economic impact, which would ignore the true economic value of petitioner's property under the clear terms of the County zoning ordinance and the particular facts of this case. Petitioners' contrary argument is riddled with error.

1. First, "[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Protection*, 560 U.S. 702, 732 (2010). Petitioners, however, pay only lip service to the central role that state law plays under this Court's precedent in defining in the first instance the scope of the property interest that has allegedly been taken by a regulation.

In particular, petitioners propose that lot lines established by state law presumptively define the geographic boundaries of the property for the purpose of evaluating the economic impact of a governmental restriction on that property's use, while ignoring other state laws that authoritatively make clear that state lot lines lack such legal significance. Indeed, in earlier litigation involving these same parties, the Wisconsin courts held that petitioners' two substandard, adjacent lots had been "effectively merged" for the purpose of compliance with the very zoning restriction petitioners challenge as a taking. Petitioners' reliance on the lines dividing their two lots is therefore entirely misplaced. They create no presumptive definition of the scope of property for takings purposes and, even if they did, any such presumption would be easily overcome in this case by other state laws that squarely deny the presumption's legitimacy in Wisconsin.

2. Wisconsin law, as reflected both in the County zoning ordinance and NR 118, is also consistent with how States and local governments nationwide have

long treated commonly owned, adjacent substandard lots. For almost a century, state statutes and regulations and municipal zoning ordinances across the country have drawn precisely the same distinction. They have conditioned the availability of an exemption from minimum acreage requirements to commonly owned, adjacent substandard lots on combining the acreage on the adjacent lots to meet or at least more closely approximate those requirements.

Indeed, the distinct treatment of commonly owned, adjacent substandard lots is so longstanding and widespread as to be fairly considered part of what Justice Kennedy has described as "the whole of our legal tradition" upon which "reasonable expectations must be understood" in defining property rights in land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring). Petitioners, accordingly, cannot persuasively maintain that the ordinance's restrictions on their separate sale of Lot E as a developable parcel either amounted to an unfair surprise or interfered with the reasonable expectations that define their property rights. No doubt that is also why no court has ever held during the approximately one hundred years that such laws effectively merging adjacent substandard lots have been around that they amounted to an unconstitutional taking.

3. Petitioners also misread *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), as well as this Court's subsequent rulings, in claiming that the state court of appeals below ran afoul of this Court's precedent in deciding that petitioners had

failed to make a sufficient showing of adverse economic impact to survive the County's motion for summary judgment. The state appellate court's consideration of the undisputed evidence of the value of Lot E in relation to Lot F is entirely consistent with *Penn Central* and every other instance in which the Court has similarly made clear that a court should consider the economic impact of the "parcel as a whole" in evaluating a regulatory takings claim. *Id.* at 130-31. A fair reading of the Court's case law provides no support for petitioners' suggestion that this case can be fairly distinguished from that controlling precedent on the ground that this case involves an "aggregation" of distinct lots and the Court's cases all involved rejections of landowners' efforts to "segment" distinct lots. The Court's rationale cannot be so cabined.

Lot lines are no more controlling for defining the "parcel as a whole" inquiry than a host of other bases that this Court has previously rejected in regulatory takings cases for dividing commonly owned property rights up into smaller parts. In regulatory takings cases, lot lines are among the generally relevant factors to be considered along with several case-specific factors, including but not limited to contiguousness, ownership history, and unity of use, in deciding how the Takings Clause's concerns with "fairness and justice" warrant defining the parcel in a particular case. But, where, as here, applicable state law directly contradicts the relevance of state lot lines that petitioners nonetheless posit, in no event may they be deemed to

answer the question how the "parcel as a whole" must be defined.

4. Finally, the "parcel as a whole" theory in application to the unusual circumstances of this case might best be viewed as a red herring because it does not resolve petitioners' takings claim. Regardless of how one defines the parcel, whether Lots E and F are separate or combined, petitioners' takings claim is equally without merit. No matter how one draws the lines, sufficient valuable use of petitioners' land remains to warrant dismissal of petitioners' complaint on summary judgment.

Lot E's market value depends on what uses are in fact allowed of Lot E under the terms of the County zoning ordinance, and those allowable uses do not depend upon how a reviewing court chooses to define the "parcel" in a takings case challenging that ordinance. Here, the state courts concluded there was no genuine issue of material fact to support petitioners' allegation that the ordinance reduced significantly the value of Lot E. The state courts found the difference between the market value of the two lots combined, with one residence, was only ten percent less than if there were a residence on both lots and they could be separately sold.

It was that finding that prompted both courts to conclude that summary judgment dismissing petitioners' takings complaint was warranted. Because that same deficiency persists under either of the competing

theories for defining petitioners' property, the judgment of the state courts can be affirmed without even addressing the question presented.

ARGUMENT

THE STATE COURT OF APPEALS CORRECTLY COMPARED THE VALUE OF PETITIONERS' TWO ADJACENT LOTS WITH ONE RESIDENCE TO THE VALUE OF THE TWO LOTS WITH ONE RESIDENCE ON EACH LOT IN RULING THAT THE COUNTY'S APPLICATION OF ITS MINIMUM BUILDABLE ACREAGE REQUIREMENT TO PETITIONERS' PROPERTY DID NOT CONSTITUTE A REGULATORY TAKING

Petitioners ask this Court to "examine the difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); *see* Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) ("The difficulty is aggravated when the question is raised of how to define the 'particular thing' whose value is to furnish the denominator of the fraction."). Nominally embracing this Court's ruling in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), that the extent of deprivation effected by a regulatory action should be measured against the value of "the parcel as a whole" (*id.* at 130-31), petitioners invite this Court to rule that

the physical boundaries of that "whole parcel" should be presumptively defined by lot lines established under state law. *See* Pet. Br. 24-26. The Court should decline the invitation.

Petitioners' view of federal regulatory takings law finds no support in either state law or this Court's takings precedent. It intrudes upon, rather than promotes, a State's recognized authority to define private property rights in land by exaggerating the significance of one aspect of state law—lot lines—and by ignoring state property law "as a whole." It rests on a reading of the Court's opinions that cannot be squared with the actual rulings in those cases. And it is contradicted by the undisputed facts of this case, which make clear that regardless of how one defines petitioners' property, petitioners have not suffered an economic burden sufficient to sustain their takings claim. The judgment of the state court of appeals below should be affirmed.

A. The Judgment Below Rests On Longstanding, Generally Applicable State Law Governing Commonly Owned, Substandard Adjacent Lots And Not On A Per Se Rule Of Federal Constitutional Law

Much of petitioners' brief is misdirected. It faults the state courts below for relying on an interpretation of federal constitutional law that, according to petitioners, fails to give sufficient deference to state law. Petitioners, however, have it backwards. The state court judgment under review does *not* rest on a sweeping

principle of federal constitutional law mandating that, notwithstanding any state law to the contrary, courts in takings cases must always combine contiguous land in evaluating whether a land-use restriction on any part of that land amounts to a regulatory taking. Instead, it is petitioners' own arguments that rest on the proposition that federal constitutional takings law overrides state property law. Petitioners single out one isolated part of state law—that creating lot lines—as presumptively overriding other parts of state property law that limit the legal significance of those same lot lines. This Court's precedent, however, makes plain that proper respect for state property law requires consideration of all and not some state law in defining the scope of property rights in regulatory takings cases, along with a host of other case-specific factors.

1. The extent to which property is protected by the Takings Clause is of course ultimately a question of federal constitutional law, but "property interests * * * are not created by the Constitution." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). Nor are property interests created by a landowner's unilateral, subjective expectations concerning what the landowner would prefer to do with the land. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* For that same reason, even a regulation that deprives a landowner of all economically viable use of her property is not a taking when the regulation expresses "the restrictions that background principles of the State's

law of property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

Where, as in this case, what is at issue are private property rights in land and the significance of lot lines established under state law, a court may accordingly look to "how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.* at 1017 n.7. The relevant state law includes the law of Wisconsin that established petitioners' lot lines, but also includes Wisconsin's "background principles" of property law. "The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Protection*, 560 U.S. 702, 732 (2010).

2. Looking therefore to "property rights as they are established" in Wisconsin (*id.*), there is plainly no merit to petitioners' contention that the lines defining Lot E presumptively define the exclusive geographic scope of petitioners' property in evaluating their takings claim. The Wisconsin law that established the lot lines dividing Lot E from Lot F cannot support the great weight that petitioners would place upon those lines. And their argument quickly crumbles.

The lot lines were initially drawn in 1959, a year before petitioners' parents purchased the first lot (Lot F). *See* J.A. 84-85. There was nothing inherently permanent or otherwise immutable about those initial lot lines, which are subject to subsequent change in multiple ways. For example, under Wisconsin law, courts can alter lots (Wis. Stat. § 236.45(2)(am)(1) (2015-2016)); new roads can modify lots (66 Wis. Op. Att'y Gen. 2, 7 (1977)); and adverse possession can add and subtract from lots (Wis. Stat. § 893.24 (2015-2016)). Even more tellingly, abutting landowners in Wisconsin routinely redraw lot lines by selling portions of their land to each other, without any government oversight. *See, e.g.*, Wis. Stat. § 236.45(2)(am)(3). Indeed, the maps in the record of this case show that Lot F's lines are dramatically different today from what they were when first drawn in 1959. There have clearly been significant subsequent subtractions and additions. For example, in 1964, petitioners' parents added to Lot F by purchasing an additional boathouse lot. *See* J.A. 117. A comparison of survey maps in the record shows that Lot F today is approximately half its original size. *Compare* J.A. 85, *with id.* 22, 28, 60. Indeed, contrary to their current statement that they never contemplated action "that would blur the property lines" (Pet. Br. 30), petitioners themselves initially sought to redraw the lot lines for both Lots E and F (App., *infra*, F1, F3-F4, F34), and their parents had previously contemplated doing the same (J.A. 89-92). *See* note 7, *supra*.

Even more fundamentally, the government's initial creation of lot lines does not reflect a formal governmental determination (let alone a guarantee) regarding the suitability of those lots for a particular kind or amount of residential development. That more formal determination of suitability for residential development instead occurred for petitioners' lots (and all lot owners along the riverway) in 1975, after a rigorous assessment of the very significant physical challenges for residential development presented by the geology of the lands located along the St. Croix River in both Wisconsin and Minnesota. *See* pp. 6-10, *supra*. That comprehensive assessment in turn led to the adoption of state law, in the form of the St. Croix County zoning ordinance in compliance with NR 118, which both restricted development based on minimum buildable acreage requirements and created an exception for certain types of pre-existing lots that failed to meet the new standards.

The judgment of state and municipal lawmakers was that where, as in this case, there are two adjacent substandard lots under common ownership, those lots should be effectively merged for the purposes of meeting the minimum buildable acreage requirement before any exemption to that requirement could be applied. Cty. Zoning Ord. §§ 17.36.G.1, 17.36.I.4. The justification for the distinction between commonly owned, adjacent substandard lots and single, isolated substandard lots is straightforward. Those who own adjacent substandard lots are less in need of an

automatic exemption from the minimum acreage requirement to avoid hardship. Unlike owners of isolated lots who, absent a complete exemption, will have no ability to develop their property, the owners of adjacent lots can take advantage of their combined acreage to more fully satisfy the acreage requirement.

Petitioners' own circumstances are illustrative. They do not need the benefit of the complete exemption from the minimum buildable acreage requirement to be able to make economically valuable use of their land. Under the terms of the County's zoning ordinance, it is undisputed that petitioners are allowed to build one residence on their two lots, which allows their property to retain significant economic value. Petitioners, moreover, are allowed to build that residence even though the amount of buildable acreage on their two lots combined (.98 acres) still falls short of the one-acre minimum. Petitioners, therefore, are still benefiting from a partial lifting of the County zoning ordinance's minimum buildable acreage requirement.

The palpable reduction in hardship to the owner of adjacent substandard lots also underscores why, contrary to petitioners' contention (Pet. Br. 7, 31), the County zoning ordinance's distinctive treatment of such landowners is both fair and just. Any lifting of a development restriction on a substandard lot has a substantial cost. The exception permits a permanent residence to be built in a location that the land-use planners and local officials have otherwise deemed physically unsuitable for such a residence, which necessarily undercuts the State's and County's ability to

prevent harmful soil erosion, surface and ground water contamination, and flood damage in a treasured riverway. There is nothing temporary or transitional about those very real costs.

No less weighty is the legal import of the County zoning ordinance's treatment of commonly owned, adjacent substandard lots for the lot line dividing Lots E and F. As aptly described by the state appellate court below and in the earlier litigation, Lots E and F are "effectively merged" as a matter of state law. Pet. App. A1; App., *infra*, A10. State law therefore already determined the legal relevance of lot lines for the purposes of state property law.

Petitioners cannot pick and choose among relevant state laws that define the scope of their property rights. Yet, that is in effect what they propose here. The state laws they view as friendly to their argument, they contend, create a presumption as a matter of federal constitutional law. And those state laws that contradict their view are relegated, under their analysis, to a secondary status. But, of course, that is not how state property law works in defining private property rights in land under this Court's takings precedent. One must look to the whole of state property law, akin to how this Court has made clear that one looks to the parcel "as a whole" in defining the relevant property for regulatory takings analysis.[13]

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[13] Petitioners' reliance (Pet. Br. 5) on the fact that for many years their tax assessments for Lots E and F were apparently

3. Nor, contrary to petitioners' repeated suggestion (Pet. Br. 5, 27), is there any reasonable basis for their reported surprise that the County's zoning ordinance treated commonly owned, adjacent substandard lots in this particular manner. The County drew the same distinction in the very first zoning ordinance that the County adopted in 1975 in response to the 1972 national legislation authorizing protection of the Lower St. Croix River.[14] The 1975 ordinance imposed a

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based on the incorrect assumption that the two lots were separately saleable or developable is entirely misplaced. Those tax assessments have no bearing on the merits of their takings claim. Tax assessors do not purport to be experts on what zoning restrictions in fact allow, which would require detailed expert inspection of the properties' physical characteristics; nor do they speak authoritatively for the zoning board and local government land-use officials. *Cf.* 5-22 *Nichols on Eminent Domain*, § 22.01 (2015) ("It is almost everywhere the law that the value placed upon a parcel of land for the purposes of taxation by the assessors of the town in which it is situated is no evidence of its value for other than tax purposes."). Whenever a landowner believes that her land is being taxed at too high a rate, she can challenge an assessment and, if successful, obtain a lower assessment and pay lower taxes. *See District Intown Props., Ltd. v. District of Columbia*, 198 F.3d 874, 882 (CADC 1999) ("[A]ppellants retain the right to recombine the parcels and treat them as one property for the purposes of taxation * * *."). Wisconsin, like other States, provides property owners with the opportunity to contest tax assessments, and that is precisely what the petitioners did after losing their challenge to the County's denial of their variance application. Their two lots have been valued as a combined lot ever since. *See* J.A. 23, 24, 80.

[14] Further underscoring the longstanding nature of the County's distinct treatment of commonly owned, adjacent substandard lots, the County's zoning ordinance in 1967, eight years before the river valley restrictions were adopted, restricted its exemption for pre-existing lots served by a public sewer but not

minimum buildable acreage requirement of one acre and included a "special exception" from that requirement for lots, like petitioners', recorded before the new ordinance's adoption, so long as the "lands abutting the parcel in question are not under ownership or control of the applicant." Cty. Zoning Ord. § 3.10.8 (1975), App., *infra*, D1. And, even as the County modified the zoning ordinance's technical requirements somewhat over time, there was one constant: the exception for pre-recorded lots would not apply to substandard lots when the applicant owned an adjacent lot. *See* Cty. Zoning Ord. § 3.12.H.1 (1978), App., *infra*, D2 ("[Pre-existing substandard lots] may be allowed as building sites as a special exception provided that lands abutting the parcel in question are not under ownership or control of the applicant * * *."); Cty. Zoning Ord. § 17.36(5)(n)(1) (1986), App., *infra*, D3 (A requirement for a special exception is that "[t]he lot is in separate ownership from abutting lands or, if lots in an existing subdivision are in common ownership, each of the lots has at least one acre of net project area.").

Petitioners' stated surprise at learning that the County zoning ordinance treated commonly owned, adjacent substandard lots differently cannot therefore be fairly characterized as resulting from a lack of adequate notice. It is simply not true that petitioners "had every reason to understand that Lot E was separate

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meeting minimum size requirements "[i]f abutting lands and the substandard lot are owned by the same owner," and imposed limits on the substandard lots being "sold or used." St. Croix Cty. Zoning Ord. § 6.31(3) (1967).

and distinct from Lot F." Pet. Br. 29. The distinct treatment for substandard lots like theirs had been on the books for decades. *See* J.A. 67; pp. 41-45, *infra* (similar state and local laws are both longstanding and exist nationwide).

4. Petitioners have also not been singled out. The restrictions that apply to their property derive from the physical characteristics of their land. Petitioners' lots did not become substandard because the County imposed a minimum acreage requirement smaller than their lot sizes. Each lot is larger in size than the minimum acreage requirement and both lots instead became substandard because of their "unique terrain," which made most of their land unsuitable for development. App., *infra*, B4, B5.

The northern border for both lots is the ordinary high water mark of the St. Croix River and each lot is bisected by an exceedingly steep, nontraversable wooded slope leading to a 130-foot tall bluff. The proximity to the river presents significant flood risks (as experienced by petitioners on multiple occasions (*see* Pet. App. A4; J.A. 100-02)); and the bluff presents serious problems of erosion and stability. Indeed, the problems with petitioners' land for development are so great that petitioners still fall short of the one buildable acre minimum requirement even after combining the total buildable acreage available on both lots. The only reason petitioners are nonetheless permitted to replace their small, existing summer recreational cabin with a larger, new residence on their two lots is because of their entitlement to an exception for their

pre-recorded lots. *See* notes 4 & 10, *supra*. Petitioners therefore are beneficiaries of the same exception from the minimum acreage requirement that they claim unconstitutionally takes their property.

Petitioners are also not being treated any differently from their similarly situated neighbors.[15] As the Board explained in denying petitioners' application for a variance, "[a]t least eight other property owners in the immediate Cove Court/Court Road area own one or more contiguous substandard lots along the river with just one building site. Many of these contiguous lots are over two acres combined." J.A. 67. Because, moreover, the same merger rules apply up and down, and on both the Wisconsin and Minnesota sides of the St. Croix River, far more than just petitioners' immediate neighbors have been subject to the same restrictions. What would therefore be truly unfair would be to single out petitioners for special treatment—exempting them from generally applicable sale and development restrictions—while allowing petitioners to enjoy the increased property values that have resulted from

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[15] In the earlier litigation, petitioners complained that the County granted a hardship variance from the acreage requirement to a neighbor, who owned adjacent, substandard lots, and petitioners may raise that contention again here. The state court of appeals properly declined to consider that claim on procedural grounds (App., *infra*, A13) and, for that reason, the record in this case does not present the relevant facts, including that the neighbor presented a far stronger case for a hardship variance because, unlike petitioners, the neighbor did not have the option to build on the bluff above, owned only one substandard lot, and was not similarly seeking to build in a floodplain. In short, the neighbor lacked development options available to petitioners.

those very same restrictions on other landowners. *See* Brief of Carlisle Ford Runge, *et al.*, as *Amici Curiae*, Pt. V (describing increased property values enjoyed by petitioners because of zoning restrictions and corresponding windfall that would be gained by petitioners if they, alone, were exempted from buildable acreage requirement).

5. Finally, petitioners mischaracterize the state court's judgment as depending entirely on a *per se* rule of federal constitutional law that provides courts should always treat commonly owned contiguous parcels as the "parcel as a whole" in determining the landowner's economic burden in regulatory takings cases. Pet. Br. 13. As emphasized in the County's brief in opposition (Opp. 25-26) to the petition for certiorari, however, the state court of appeals' judgment below does not depend upon the sweeping, unqualified rule of federal constitutional law set forth in the petition's question presented. Both the court of appeals' reasoning and, in all events, its judgment are sufficiently supported by the merger rule's central role in defining petitioners' property. No more is needed.

The appellate tribunal below made clear from its very first sentences how it "agree[d] with the circuit court" that the County ordinance had "effectively merged" the petitioners' two adjacent lots. Pet. App. A1-A2. The court further found, based again on the ordinance's plain terms, that petitioners "never possessed an unfettered 'right' to treat the lots separately." *Id.* at A17-A18. This finding underscored the

unreasonableness of petitioners' placing such dispositive weight on the lot lines as a matter of state law. The legal significance of the County zoning ordinance, including its merger provision for commonly owned, adjacent substandard lots, was a central element of the lower courts' disposition of this case in both rounds of litigation and cannot be disregarded. None of that discussion of applicable state law would have been necessary or relevant had the state court been relying, as petitioners nonetheless assert, on a *per se* rule of federal constitutional law that defined the "parcel as a whole" regardless of state law.

Nor is the state court of appeals' ruling otherwise best understood as embracing a *per se* rule that commonly owned contiguous lots must always be aggregated in all regulatory takings cases regardless of any other factors and factual nuances. At most, the lower court was simply rejecting *petitioners'* proposed *per se* rule based on state lot lines, consistent with this Court's instruction to "resist the temptation to adopt *per se* rules" in regulatory takings cases. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002). In this particular case, moreover, there was directly applicable state law that flatly contradicted petitioners' reliance on state lot lines as the basis of their own *per se* rule. In other cases, as discussed below (*see* pp. 52-53, *infra*), courts properly consider a host of case-specific factors in determining the scope of the "relevant parcel" in assessing a regulation's economic impact. The courts of Wisconsin have not held to the contrary but, like

other federal and state courts, have engaged in case-specific inquiries turning on the particular facts and circumstances of each case. *See, e.g., R.W. Docks & Slips v. State*, 548 N.W.2d 785, 786-91 (Wis. 2001).

The County acknowledges that isolated language, largely limited to a single sentence within the state court of appeals' unpublished opinion, is nonetheless susceptible to a broader reading. The court's statement (Pet. App. A11)—that "[r]egardless of how that property is subdivided, contiguousness is the key fact under *Zealy* [*v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996)]"—could be misunderstood to mean that contiguous property should always be aggregated in defining the "parcel as a whole" in a regulatory takings case regardless of any other factors. As raised in the County's brief in opposition (Opp. 25-26), the County does not believe that is the better reading of the ruling of either the court of appeals in this case,[16] or of the Wisconsin Supreme Court in *Zealy*.[17] And, in all events, the

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[16] As described above, the lower courts' repeated emphasis on how the County ordinance effectively merged petitioners' two lots is inconsistent with the notion that those courts concluded that state law was irrelevant to the "parcel as a whole" issue. In addition, the court's reference to contiguousness as the "key fact" is far different from an unequivocal statement that contiguousness always defines the scope of a parcel of land in all takings cases. In this case, contiguousness was certainly the "key" fact because it triggered the County ordinance's merger provision. The word "key" also does not deny the possible relevance of other factors.

[17] Rather than relying on an inflexible categorical approach to all takings cases, the *Zealy* court is better understood as merely rejecting the particular reasons (accepted by the court of appeals

County does not defend the judgment on that broader reading of *Zealy*, but instead on the narrower grounds

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in that case) that the property owner proffered for defining the parcel more narrowly. That is why the state high court explained at some length the "possible difficulty in the application of the rule proposed by the court of appeals in the present case." 548 N.W.2d at 533. *Zealy* was also what petitioners themselves would characterize as a "segmentation" rather than an "aggregation" case. In *Zealy*, the takings plaintiff owned a single parcel consisting of 10.4 contiguous acres, with no suggestion in the opinion of further division into formal, distinct lots, and municipal zoning laws permitted development of some, but not all, of that parcel for residential purposes. The plaintiff argued that the courts should "take into account such factors as 'a landowner's anticipated investment opportunities * * * in order to determine what the parcel at issue should be." *Id.* at 532. In rejecting that claim, the *Zealy* court explained that "[l]ooking to a landowner's anticipated use of various parcels and sub-parcels of land in order to determine the extent of the parcel at issue would require ascertaining a landowner's subjective intent before being able to evaluate a possible takings claim." *Id.* at 533. It "would confuse both the agencies responsible for zoning and the courts called on to adjudicate such claims, and increase the difficulty of an already complex inquiry." *Id.* The state court, accordingly, rejected the landowner's claim that it should consider exclusively the adverse economic impact of the development restriction on the value of the portion of the parcel on which residential development was not allowed, without also taking into account the value of the portion on which such development was permitted. Not only does *Zealy* clearly comport with this Court's own precedent, including *Penn Central* as petitioners themselves read it, because it would fit their definition of a "segmentation" case, but the ruling also makes obvious good sense. The *Zealy* court should not be misunderstood to have done anything more. That the County in litigation below pressed a broader argument, in addition to the narrow argument based on the merger provision, is also of no continuing significance. This Court reviews lower court reasoning and judgments, and not parties' unsuccessful legal arguments.

described herein that are fully supported by the record and this Court's precedent.[18]

B. Applicable State Law In This Case Is Consistent With Longstanding And Nationwide Practices Of State And Municipal Governments

1. The County did not originate the practice of treating commonly owned, adjacent substandard lots differently in determining the extent to which preexisting lots would be entitled to exemptions from subsequently established zoning requirements. The practice is longstanding and widespread. Often described as "merger provisions," state and municipal zoning laws across the nation have for almost a century drawn the very same distinction based on the fundamental fairness of identifying those most in need of a hardship exemption. They strike the balance between the community's interest in achieving the zoning requirement's important purposes and the landowner's interest in developing a substandard lot.

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[18] Should this Court disagree with our submission and conclude, contrary to our view, that the lower courts' judgment necessarily rests on an uncompromising *per se* definition of the "parcel as a whole" in takings cases and choose not to consider the readily available alternative, narrow bases for sustaining that judgment, the case should be remanded to provide the parties with the opportunity to litigate the proper basis for defining the parcel before the state courts in the first instance.

To be sure, the precise terms of those state and municipal laws differ at their margin in their particulars and their operation, underscoring the advantages of federalism. But their basic approach and underlying rationale are fundamentally the same in all their permutations. The owner of a nonconforming lot "is entitled to an exception only if his lot is isolated. If the owner of such a lot owns another lot adjacent to it, he is not entitled to an exception. Rather, he must combine the two lots to form one which will meet, or more closely approximate, the frontage and area requirements of the ordinance." 2 Robert M. Anderson, *American Law of Zoning*, § 8.49 (1968). As described by the Maine Supreme Court, a merger provision "is designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property." *Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015).

2. An amicus brief filed in support of respondents by the State and Local Legal Center on behalf of the National Association of Counties and a host of other state and local governmental organizations fully documents the long and rich history of such state and municipal merger provisions. *See* Brief of Nat'l Ass'n of Counties, *et al.*, as *Amici Curiae*. Merger provisions can be found as early as 1926, and they became so common a few decades later as to be included in the Model Zoning Ordinance published by the American Society of Planning Officials in 1960. *Id.* at 9-10, *citing* American Society of Planning Officials, *The Text of a Model*

Zoning Ordinance, 26 (2d ed. 1960). Many States enacted statutes that specifically authorize municipalities to include merger provisions; in many States, local governments have adopted merger provisions based on general state legislative grants of authority; and in other States, merger is a common law doctrine that applies even in the absence of any formal state legislation. *See* Nat'l Ass'n of Counties Amicus Br. 12-14. The amicus brief lists illustrative examples of merger provisions from 132 municipal zoning ordinances located in 33 different States, crisscrossing the country from east to west and north to south. *Id.* at 14-31.

3. The prevalence of merger provisions is highly relevant to this case. First, it establishes their settled role in how States define the metes and bounds of private property rights in land, especially the limited legal import of lot lines as a matter of state law. Second, it makes clear that anyone remotely knowledgeable about land use law, including realtors, mortgagees, title companies, builders, and local counsel, knows the implications of owning adjacent, substandard lots. *See id.* at 32-34. The relevant law is therefore readily accessible to landowners, including petitioners and their parents, based on the exercise of the kind of minimal due diligence routinely engaged in by owners of real property who contemplate possible development possibilities and real estate transactions.

But even more fundamentally, the longstanding and widespread prevalence of merger provisions evidences why Wisconsin's treatment of commonly owned,

adjacent substandard lots, as reflected in both NR 118 and the County zoning ordinance, can fairly be considered part of what Justice Kennedy has described as "the whole of our legal tradition" upon which "reasonable expectations must be understood." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). Merger provisions "are based on objective rules and customs that can be understood as reasonable by all parties involved." *Id.* The application of Wisconsin law accordingly supplies a proper base for defining the limits of petitioners' legitimate expectations in the use of their land, in the same manner that the Court held that Florida riparian law did in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. at 732. And invocation of Wisconsin state law to define those expectations is not akin to the far more sweeping categorical claim, rejected by this Court in *Palazzolo v. Rhode Island*, that a purchaser or successive title holder of property is deemed to have notice of any state law restrictions that pre-dated ownership and is therefore barred from claiming that any such restriction is a regulatory taking. *See* 533 U.S. at 626-27.

No doubt that is why no court has ever held in at least the one-hundred years that merger provisions like Wisconsin's have been around that they amount to an unconstitutional taking. In those rare instances when the argument has been made, courts have quickly dismissed the claim of unconstitutionality. *See, e.g., DiMillio v. Zoning Board of Review of the Town of South Kingston*, 574 A.2d 754, 757 (R.I. 1990) (rejecting takings claim because under the merger provision

"[t]he unimproved portion of petitioner's lot adds value to the lot with the existing dwelling, and the vacant lot remains available to enlarge the existing home"); *Quinn v. Board of County Comm'rs for Queen Anne's County, Md.*, 124 F. Supp.3d 586 (D. Md. 2014) (upholding merger provision).

C. The County Ordinance's Treatment Of Petitioners' Property Is Entirely Consistent With This Court's Regulatory Takings Precedent For Defining The Parcel

Merger provisions, like the County's here, are also in complete harmony with this Court's regulatory takings precedent. The Court has never intimated that a State lacks the power to decide as a matter of state law that lot lines are not controlling in such circumstances. And the state court of appeals' consideration of the value of Lot E combined with Lot F in evaluating the merits of petitioners' takings claim is in obvious accord with this Court's repeated admonition, beginning in *Penn Central*, that courts should consider the economic impact on the "parcel as a whole" in takings cases. 438 U.S. at 130-31.

1. The Court's seminal ruling on the so-called "denominator question" of regulatory takings law – regarding how to define the property for the purpose of assessing a regulation's economic impact – is, of course, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In *Penn Central*, the Court held that "'[t]aking' jurisprudence does not divide a single parcel

into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130. This Court "focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole.*" *Id.* at 130-31 (emphasis added); *see Concrete Pipe & Prods. of Calif., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 644 (1993) ("[W]e rejected this analysis six years ago in [*Penn Central*], where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable."). While claiming to embrace *Penn Central*, petitioners seek to distinguish the *Penn Central* line of precedent based on their view that what *Penn Central* rejects is a court's *segmentation* of a discrete parcel of property into smaller parts, and that the Wisconsin courts misread *Penn Central* as requiring the *aggregation* of distinct parcels of property. *See* Pet. Br. 13-16. Petitioners' proffered distinction, however, is doubly flawed.

a. First, even if *Penn Central* could be so narrowly read (which we dispute below), the judgment of the state courts dismissing petitioners' takings claim does not depend on its broader reading. As described above (*see* pp. 28-32, *supra*), this is not a case where the courts unilaterally insisted on combining what were otherwise distinct parcels as a matter of state law. The opposite is true. The state courts in prior litigation squarely held that Lots E and F were not, as a

matter of state law, distinct parcels for the purposes of applying the County's minimum building acreage requirement. The two parcels had been "effectively merged" by state law for decades. Pet. App. A1-A2; App., *infra*, A10.

Contrary to petitioners' characterization, *Penn Central* is not therefore being invoked in this case to aggregate land that as a matter of state law constitutes two distinct parcels. State law has itself aggregated the two lots and petitioners now seek to segment into smaller pieces what state law has effectively defined to be the "whole parcel." But, of course, that is precisely what petitioners acknowledge the *Penn Central* Court clearly held should not be done.

b. The second flaw in petitioners' reasoning is that *Penn Central*'s rationale in favor of considering the "parcel as a whole" cannot in any event be fairly limited to so-called "segmentation" cases. The "fairness and justice" concerns underlying the Takings Clause, which support looking to the entire parcel, do not wholly disappear if the landowner's property consists of two adjacent lots.

Here too, petitioners overstate both the legal significance of lot lines, standing alone, and the meaningfulness of the segmentation/aggregation distinction. They also understate the logical reach of the Court's precedent.

i. In *Penn Central*, the Court rejected the property owner's claim that regulatory takings analysis should separate out from their parcel of land their "use

of air rights * * * irrespective of the impact of the restriction on the value of the parcel as a whole." *Id.* at 130 n.27. Although petitioners dub this a "segmentation" case, the Court can no less fairly be understood to have aggregated the air rights and the surface development rights in assessing the economic impact of the land use restriction on the owner's entire parcel as a whole. *Cf. Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 749 (1997) (Scalia, J., concurring) (emphasis added) ("[In *Penn Central*, t]he relevant land, it could be said, was the *aggregation* of the owner's parcels subject to the regulation (or at least the contiguous parcels) * * *."). Significantly, the air rights at issue in *Penn Central* were an exceedingly valuable property right distinct from the surface development rights, and they could be separately bought and sold under state law.

ii. Similarly, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the Court held that the coal required to be left in the ground did "not constitute a separate segment of property for takings law purposes." *Id.* at 498. According to the Court, it was not preclusive of defining the parcel more broadly that applicable state law recognized a separate interest in land, known as the support estate, which could be conveyed separately: "[O]ur takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.* at 500. While certainly not denying the relevance of all state law in determining the bounds of takings analysis, the Court rejected the notion that "whether state law allowed the

separate sale of the segment of property" necessarily narrowed the "parcel" for takings purposes. *Id.* Here again, the Court aggregated the surface and support estates even though state law recognized them as distinct rights and estates. The Court therefore did not treat a state law determination that property rights could be severed as meaning that those severed interests could not also be aggregated in determining what constitutes the "parcel as a whole" for regulatory takings purposes.

iii. *Palazzolo v. Rhode Island*, decided in 2001, is, moreover, squarely on point and directly contradicts petitioners' reliance on lot lines. The plaintiff landowner in that case claimed that a state wetlands regulation amounted to an unconstitutional taking of his property without compensation. 533 U.S. at 611. In rejecting that claim, the Court relied on the fact that it was undisputed that the landowner could build a house on one small upland portion of his 20 acres and the value of that development was sufficient to defeat the claim of a *per se* taking under *Lucas*. *Id.* at 631. The Court reached this result even though it was undisputed that the 20 acres consisted of 74 distinctly platted subdivision lots previously approved by the State. *Id.* at 613, 616, 623. The Court never intimated that the existence of the 74 individual lots was inconsistent with treating the landowner's 20 acres as the "entire parcel." *Id.* at 631-32.

Nor is the *Palazzolo* Court's description of the 74 individual lots as the "entire parcel" at all undercut by its refusal to consider the landowner's belated claim in

that case that the Court should ignore the value of that upland parcel in determining whether the non-uplands portion had been taken. While declining to do so because the landowner had failed to press the issue in his jurisdictional petition (*id.*), the Court simultaneously made clear that the landowner's procedural shortfall had been his failure to challenge the "parcel as a whole rule" altogether—a rule with which the Court suggested it had "at times expressed discomfort." *Id.* at 631. The Court did not question that if the parcel as a whole rule applied, then the entire 20 acres, including all 74 lots, constituted the "entire parcel" under the logic of *Penn Central*. *Id.* at 631-32. At the very least, the Court in *Palazzolo* did not grasp, let alone embrace, what petitioners now assert is a limiting principle long hidden within *Penn Central*.

iv. The Court's more recent endorsement of the "parcel as a whole rule" in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), similarly resists the aggregation/segmentation distinction. In arguing that a temporary moratorium on land use development amounted to an unconstitutional taking requiring the payment of just compensation, the plaintiff landowners contended that the Court should focus only on that time period when the moratorium applied, effectively severing the property temporally for the purpose of takings analysis. *Id.* at 320. Once again, the Court squarely rejected the propriety of such a conceptual severance. *Id.* at 331. It was no matter that state law would have permitted a landowner to create a distinct property interest in the

land of a temporal nature, such as a leasehold. Petitioners can characterize that as a refusal to "segment" the property temporarily, but it is no less a ruling by the Court that those distinct state law property interests defined by discrete segments of time should be "aggregated" in considering the economic impact of the land use restriction on the "parcel as a whole."

2. Lot lines are, at bottom, no different from any of these other ways to carve up a property owner's interest in land or other types of property, whether spatially, temporally, horizontally, or vertically. Like air rights, support estates, and leaseholds, lot lines do not conclusively—or as proposed by petitioners, presumptively—define the "parcel as a whole" for regulatory takings analysis. Indeed, were the rule otherwise, one could fairly anticipate that owners of property would quickly respond by dividing property rights, including in land, into ever smaller "parcels" to maximize their takings claims at the expense of the government's police power. *See City of Coeur D'Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006) ("[T]he government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis."). Neither the Fifth Amendment's concerns with "justice" nor its commitment to "fairness" would be served by a federal constitutional rule of law that encouraged such manipulative behavior and self-created hardships. *See Bevan v. Brandon Twp.*, 475 N.W.2d 37, 43 (Mich. 1991), quoting *Korby v. Redford Twp.*, 82 N.W.2d 441, 443 (Mich. 1957) (explaining that perverse results would

occur if "'[a]rtificial device[s]' such as tax identification numbers and separate deeds" controlled takings analysis because "it would be competent for landowners to perpetually defeat future zoning restrictions by criss-crossing their lands on a plat map with lines ostensibly dividing the same into parcels so small that each would be unsuited to any foreseeable use unless combined with others" (second alteration in original)).

3. Does this mean that lot lines are wholly irrelevant in defining the relevant "parcel as a whole" in takings analysis? Or that contiguous, commonly owned parcels are always merged for takings purposes under every possible factual scenario? Of course not. That is not the County's position before this Court. As a general matter, a court in a takings case should consider many factors, including lot lines, in deciding the shape of a property owner's reasonable expectations.

For land, as courts have held, relevant factors include, but are not necessarily limited to, the extent to which parcels are contiguous, ownership history, physical characteristics, unity of use, the extent to which the restricted portion benefits the unregulated portion, and how the government, including state and local governments have treated the land. *See, e.g., District Intown Props., Ltd. v. District of Columbia*, 198 F.3d 874, 880-82 (CADC 1999). As the state court of appeals explained, however, those factors relevant "to determining the extent of the property at issue for purposes of a regulatory taking" do not extend to "[a] property's owner's subjective, desired use." Pet. App. A17 n.8.

The undisputed facts of this case allow for the sensible result achieved by the lower courts. Petitioners' case rests entirely on their insistence that the lot lines established under state law are controlling, on at least a presumptive basis, in defining their property. Such a claim, however, is legally untenable where, as in this case, the state courts have already ruled as a matter of state law in prior litigation that the lot lines do not have the significance that petitioners ascribe to them. The lot lines do not override state law in existence for decades that makes clear that commonly owned, adjacent substandard lots are effectively merged in applying the minimum buildable acreage requirement. Nor does the Takings Clause override a State or local government's decision in this regard and, in effect "dictate to the States [how] their general laws of property * * * are to be construed." Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 William & Mary L. Rev. 301, 327 (1993). For that same reason, even if contrary to our submission, the Court were to conclude that lot lines presumptively define the "parcel as a whole" in takings analysis, any such presumption would clearly be defeated in this case by Wisconsin law.

D. The State Courts Below In All Events Properly Declined To Consider Petitioners' Ownership Of Lot E In Isolation From Their Ownership Of Lot F In Granting Summary Judgment In Favor Of Respondents

Finally, the parcel as a whole inquiry in this case is, in all events, largely a red herring. No matter how one formally defines the parcel in this case, whether one treats Lots E and F somehow as distinct "parcels as a whole," as petitioners contend, or treats Lots E and F together as the "parcel as a whole," as the lower courts ruled, the result in this case would be exactly the same. Petitioners would still have failed to make a sufficient showing of adverse economic impact from the restrictions on separate sale and development to defeat the County's motion for summary judgment. And affirmance of the judgment of the state court of appeals would be no less warranted.

1. The state appellate court affirmed the trial court's grant of respondents' motion for summary judgment. The gravamen of both the state trial court's and the court of appeals' rulings was the same: petitioners' failure to raise any genuine issues of material fact regarding their economic losses sufficient to maintain their claim that Lot E had been taken. Pet. App. A12-A18, B9. Both courts found that petitioners' economic losses from the restriction on separate sale and development fell far short of that mark: less than a ten percent reduction. Lots E and F are worth $698,000 if petitioners are permitted to build only one house on

the two lots combined, rather than $771,000 if petitioners were permitted to build a house on each lot. *Id.* at A6, A15-A16, B9.

Petitioners contend that the state courts erred by defining the relevant parcel for takings purposes to include both Lots E and F, rather than just treating Lot E by itself as the relevant parcel. For the reasons discussed at length above, petitioners are incorrect. Because of the County zoning ordinance's longstanding merger provision, the state courts properly applied this Court's precedent by combining petitioners' adjacent, substandard lots in assessing the extent of their economic loss for regulatory takings purposes. But, even assuming petitioners were correct, the result in this case would be no different, because the economic impact of the sale and development restrictions on petitioners' property ultimately turns not on how one defines the parcel, but on the uses of Lots E and F that the County zoning ordinance in fact permits. *Cf.* Pet. App. A13 ("We are not concerned with what uses are prohibited * * *[,] but rather only what use or uses remain.").

2. As explained by the state courts below (Pet. App. A6, A12-A13, B9), the County zoning ordinance allows petitioners to replace the existing recreational summer cabin with a larger, far nicer year-round house on Lot E alone or on land straddling both Lots E and F. In either of those circumstances, such a house would plainly be very valuable. But even if petitioners chose to build the new home solely on Lot F, combining that

house with the land located on Lot E would add significant value to petitioners' property. For the reasons detailed by the County's expert appraiser (J.A. 15-60), the value of a larger house on a larger lot that includes the longer stretch of St. Croix River beachfront provided by Lot E would be almost as much as the sum of the value of the two lots assuming each was separately developable. The difference in value, which the state courts below both concluded was not a genuinely disputed issue of material fact, would be a ten percent reduction: from $771,000 to $698,000. Pet. App. A15-A16, B9; App., *infra*, G3-G4; *see* pp. 17-20 & note 12, *supra*.

Why is the reduction in value so relatively small? The appraiser's explanation, supported by both the lower state courts' findings, is simple. Lot E, unlike Lot F, has far more beachfront (roughly twice the amount) to offer. A single residence on combined Lots E and F would therefore have the benefit of both the larger lot and the increased beachfront, privacy, and prestige, whether the house was placed on Lot E, Lot F, or across both. J.A. 32-33, 45-59; *see* note 12, *supra*.

How a court chooses to define "the parcel" for regulatory takings analysis will not change any of those numbers. Even if, as the County ordinance provides, Lot E's value is derived from its potential to be combined with Lot F (the same way that Lot F's is derived from Lot E), that is still significant market value. The "parcel as a whole" inquiry does not change the basic underlying economics of market valuation. Lot E is worth less, but it still retains significant economic value when combined with Lot F.

3. At bottom, petitioners' mistake lies in their erroneous economic assumption that if Lot E cannot be sold or developed at all apart from Lot F, then it must be worth nothing. But that is not how economics and market valuation of property work in practice. Merely because Lot E cannot be sold or developed in isolation of Lot F does not mean that it does not retain, as far as the market is concerned, significant economic value precisely because it can be developed in conjunction with Lot F and its added beachfront and acreage contribute enormous economic worth. *See* note 12, *supra*. Petitioners' contrary view depends on hypothetical facts that, ignoring the actual terms of the ordinance, falsely assume petitioners have no use of Lot E at all. *See* Pet. Br. 9.

The courts below therefore correctly rejected petitioners' argument and concluded that petitioners' own expert failed to raise a genuine issue of material fact sufficient to call into question the opinion of the County's expert witness that the adverse economic impact of the County zoning ordinance was less than a ten percent reduction in total market value. *See* App., *infra*, G3 ("[R]eliance on appraisal values that consider only a portion of the Murrs' property do[es] not create a genuine issue of material fact."). The trial court, moreover, found further, independent fault with petitioners' expert witness. In denying petitioners' motion for reconsideration, the court found that the views of petitioners' expert were not entitled to weight because they were not based on data related to fair market value at all, but "only assessment data." *Id.* at G4. The

court noted that "[p]etitioners[] have not cited legal authority that would create a genuine issue of material fact, specifically where [petitioners' expert], stated he had no information as to the effect on fair market value." *Id.* These findings are fatal to the merits of petitioners' takings claim regardless of how one defines petitioners' parcel for takings analysis purposes.

* * * * *

As in *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), the County zoning ordinance challenged in this case represents a responsible exercise of a local government's police power addressing "the complex conditions of our day." *Id.* at 387. The ordinance neither goes "too far," within the meaning of Justice Holmes' famous (albeit characteristically cryptic) formulation in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922), nor otherwise implicates the Fifth Amendment's bottom-line concerns with ensuring "fairness and justice" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The state courts properly dismissed petitioners' takings claim on summary judgment.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted.

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June 10, 2016

APPENDIX A

COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2011

Appeal No. 2008AP2728

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DONNA J. MURR,

PETITIONER-APPELLANT-
CROSS-RESPONDENT,

v.

ST. CROIX COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT-
CROSS-APPELLANT,

STATE OF WISCONSIN,

APPELLATE-INTERVENOR-
RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for St. Croix County: EDWARD F. VLACK, III, Judge. *Affirmed in part*; *reversed in part.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶ 1 HOOVER, P.J. Donna Murr appeals a circuit court judgment that affirmed in part, and reversed in part, a St. Croix County Board of Adjustment decision

denying Murr's request for six variances and two special exception permits. The Board and the State of Wisconsin (collectively, the Board) cross-appeal.[1]

¶ 2 Murr argues a St. Croix County ordinance that mirrors WIS. ADMIN. CODE § NR 118.08(4) does not apply to merge her two contiguous parcels, because the parcels did not come under common ownership until after the effective date identified in the ordinance.[2] We disagree and conclude the ordinance applies to all abutting properties that existed on the specified date, regardless of when they come under common ownership. We therefore affirm the portion of the judgment affirming the Board's decision on that issue.

¶ 3 In its cross-appeal, the Board asserts its decision was proper in all respects and contends the circuit court applied an incorrect standard of review, substituting its judgment for that of the Board. We agree and reverse the portion of the judgment reversing the Board's decision.

BACKGROUND

¶ 4 Murr's parents purchased a lot on the St. Croix River in 1960. After building a cabin near the river, they transferred title to their plumbing company. In 1963, Murr's parents purchased an adjacent lot,

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[1] The State has intervened on appeal.

[2] All references to WIS. ADMIN. CODE ch. NR 118 are to the June 2006 version.

which has remained vacant ever since. The approximately one and one-quarter acre lots are moderately level at the top and at the river, but are bisected by a steep 130 foot bluff, with the top and bottom of the lots being served by separate roads. The two lots contain approximately .48 and .50 acres of net project area.[3] The lots were transferred to Murr and her siblings in 1994 and 1995.[4]

¶ 5 Due to repeated flooding, Murr sought to reconstruct the cabin on higher ground by using fill. She initially planned to build in the same location. However, as suggested by a town planning commission, Murr ultimately requested to build further from the river to reduce the environmental impact. Murr requested the following eight variances or special exception permits: (1) variance to sell or use two contiguous substandard lots in common ownership as separate building sites; (2) variance to reconstruct and expand a nonconforming structure outside its original footprint; (3) variance to fill, grade, and place a structure in the slope preservation zone; (4) special exception to fill and grade within forty feet of the slope preservation zone; (5) special exception to fill and grade more than 2000 square feet; (6) variance to construct retaining walls and stairs inside the ordinary high-water mark setback; (7) variance to reconstruct a patio within the

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[3] "'Net project area' means developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." WIS. ADMIN. CODE § NR 118.03(27).

[4] As Donna Murr is the only named party, we refer to her singly in this decision.

ordinary high-water mark setback; and (8) variance to construct a deck within the ordinary high-water mark setback.

¶ 6 The Board conducted a public hearing at which the DNR and county zoning staff opposed Murr's application. The Board denied all of Murr's requests in a written decision. Murr sought WIS. STAT. § 59.694(10)[5] certiorari review before the circuit court. After hearing arguments and viewing the property, the circuit court affirmed the Board's denial of Murr's request to sell or use the two lots as separate building sites. However, the court reversed the Board on the remaining seven requests. Murr now appeals, and the Board cross-appeals, the circuit court decision.

DISCUSSION

¶ 7 Certiorari review under WIS. STAT. § 59.694(10) is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the board might reasonably make the order or determination in question based on the evidence. ***Klinger v. Oneida Cnty.***, 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989).

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[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Merger of Lots

¶ 8 Murr asks us to interpret ST. CROIX COUNTY, WI. CODE OF ORDINANCES, LAND USE AND DEVELOPMENT, SUBCHAPTER III.V, LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT § 17.36I.4.a. (July 1, 2007), and decide whether it applies to her situation.[6] Murr's challenge appears to question whether the Board proceeded under the correct theory of law.[7]

¶ 9 The rules for construction of statutes and ordinances are the same. ***Sauk County v. Trager***, 113 Wis. 2d 48, 55, 334 N.W.2d 272 (Ct. App. 1983). Statutory interpretation presents a question of law that we decide without deference to the trial court's decision. ***Orion Flight Servs., Inc. v. Basler Flight Serv.***, 2006 WI 51, ¶16, 290 Wis. 2d 421, 714 N.W.2d 130. The purpose of statutory interpretation is to determine what a statute means in order to give the statute its full, proper, and intended effect. ***Id.*** Generally, language is given its common, ordinary, and accepted meaning. ***Id.*** In addition, statutory language is interpreted in the context in which it is used, in relation to the language of surrounding or closely related statutes,

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[6] Murr also argues the Board improperly found that the two contiguous properties were under common ownership on the effective date specified in the ordinance. The Board concedes in its brief that the properties were separately owned until after that date.

[7] While Murr challenges the ordinance's application to her, she does not argue the Board erred by denying a variance if the ordinance applies.

and interpreted to avoid absurd or unreasonable results. *Id.*

¶ 10 WISCONSIN STAT. § 30.27(1), consistent with federal code provisions identified therein, recognizes the Lower St. Croix River as part of the national wild and scenic rivers system. Subsection 30.27(2) requires the DNR to "adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River." Subsection 30.27(3), in turn, requires all affected municipalities to adopt ordinances at least as restrictive as those adopted by the DNR. St. Croix County adopted an ordinance essentially mirroring WIS. ADMIN. CODE § NR 118.08(4). The ordinance provides:

> (4) **SUBSTANDARD LOTS** Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> (a) 1. The lot is in separate ownership from abutting lands, or
>
> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or

> developed as separate lots if each of the lots has at least one acre of net project area.
>
> (b) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

ST. CROIX COUNTY, WI, CODE OF ORDINANCES, LAND USE AND DEVELOPMENT, SUBCH. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT § 17.36I.4.a. (July 1, 2007) (internal lettering and numbering modified);[8] *see also* WIS. ADMIN. CODE § NR 118.08(4).

¶ 11 Murr argues that any existing substandard lot that was not under common ownership on January 1, 1976, remains forever exempt under the ordinance, regardless of whether it subsequently comes under common ownership with an abutting lot. Murr asserts this case involves the doctrine of merger, and relies on principles of law set forth in treatises, *see* 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 49.13 (4th ed. 2008); 2 ANDERSON'S AMERICAN ZONING § 9.67 (4th ed. 2006), and foreign state cases. Based on those authorities, Murr contends the ordinance was required to include an "explicit merger clause." We reject Murr's reliance on nonbinding authority to create ambiguity in the ordinance. The administrative code provision on which the ordinance is based is not a model of clear

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[8] The internal paragraph lettering and numbering of the ordinance is illogical and potentially confusing. Therefore, we have substituted that of the administrative code. The paragraph structure is the same in both provisions.

draftsmanship. Nonetheless, we discern no ambiguity in its application here, and we reject as unreasonable Murr's interpretation that the ordinance applies only to lots that were under common ownership on the effective date.[9]

¶ 12 Paraphrased, the first paragraph of the ordinance states: "Lots that are already in existence (i.e., those on record with the register of deeds) when the riverway district ordinance declares them substandard may be allowed as building sites if the following criteria are met." Nothing in that paragraph ties either the initial January 1, 1976 effective date or potential future effective dates to the subsequently listed criteria. The date simply establishes the point in time by which the lot must have been recorded to be eligible under

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[9] We observe, however, that the ordinance and WIS. ADMIN. CODE § NR 118.08(4)(a)2. appear to prohibit any building when, *as here*, two substandard, commonly owned lots combined still contain less than one acre of net project area. Yet, subd. (a)1. would permit building on both lots if they were separately owned, regardless of their individual amounts of net project area. This would lead to the seemingly absurd result that an owner of two adjacent properties would be prevented from building even one home, while an owner of a single substandard lot would be entitled to build. We assume without deciding that subd. (a)2. intends that where multiple abutting lots are commonly owned, individual lots must be merged into a single building site until at least one acre of net project area is attained, but that if all commonly owned lots do not contain the minimum net project area, they shall together suffice as a single buildable lot. This assumption is significant to our interpretation of the subsection's manifest intent.

the subsection's exception for building on substandard lots.

¶ 13 Accordingly, neither subds. (a)1. or (a)2., which are specifically at issue in this case, refer to any particular date. Moreover, these subdivisions utilize the present tense. If the DNR or local zoning authority had intended these provisions to apply only to the facts as they existed on the effective date, then they likely would have said so, and would have used the past tense.[10] Use of the present tense, on the other hand, indicates the criteria are to be applied to the state of facts existing at the time an owner seeks to sell or build.

¶ 14 Our interpretation is also consistent with the manifest intent of the ordinance and WIS. ADMIN. CODE § NR 118.08(4), to preserve property values while limiting environmental impacts. The stated purposes of the riverway district ordinances and ch. NR 118 are to:

> (1) Reduc[e] the adverse effects of overcrowding and poorly planned shoreline and bluff area development. (2) Prevent[] soil erosion and pollution and contamination of surface

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[10] Thus, for example, to be interpreted as Murr suggests, subd. (a)1. of the ordinance would have instead stated, "The lot [was] in separate ownership from abutting lands [on the effective date]. . . ." Similarly, subd. (a)2. would have stated: "The lot . . . or lots under common ownership . . . [had] at least one acre. . . . Adjacent substandard lots [that were] in common ownership [on the effective date] may only be . . . developed . . . if each . . . [had] at least one acre of net project area [on the effective date]. *See also* WIS. ADMIN. CODE § NR 118.08(4).

> water and groundwater. (3) Provid[e] sufficient space on lots for sanitary facilities. (4) Minimiz[e] flood damage. (5) Maintain[] property values. (6) Preserv[e] and maintain[] the exceptional scenic, cultural, and natural characteristics of the water and related land of the Lower St. Croix Riverway. . . .

ST. CROIX COUNTY, WI, CODE OF ORDINANCES, LAND USE AND DEVELOPMENT, SUBCH. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT § 17.36B.1.a. (July 1, 2007); WIS. ADMIN. CODE § NR 118.01; *see also* WIS. STAT. § 30.27(1) (purpose is "to guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations"). We agree with the State that the intent of the exception for existing lots is to "protect[] people who acquire the property before the ordinance was passed from being deprived of their property value." When the provision became effective, every person who already owned a lot could still build. If the lot was too small under the new rule, that was acceptable; owners could still build on their lot or sell it as a developable lot. However, if the substandard lot owner owned an adjacent lot as well, then the lots were effectively merged and the owner could only sell or build on the single larger lot. This result preserved both property values and the environment.

¶ 15 Murr's interpretation is inconsistent with the manifest intent of the ordinance and WIS. ADMIN. CODE § NR 118.08(4) because it (1) does nothing to

preserve property values, (2) unnecessarily and arbitrarily provides greater rights to subsequent substandard lot owners than to those who owned at the time of the provisions' effective date, and (3) fails to preserve the visual and ecological environment.

¶ 16 Because the provisions are already effective prior to subsequent owners' acquisition of their lots, there is no concern that the provisions would deprive those persons of their property. Any effect on property values has already been realized.

¶ 17 Further, because Murr is charged with knowledge of the existing zoning laws, *see* ***State ex rel. Markdale Corp. v. Board of Appeals of Milwaukee***, 27 Wis. 2d 154, 162, 133 N.W.2d 795 (1965), as a subsequent owner she was already in a better position than any person who owned at the provisions' effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, that parcel would forever remain a distinct saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot.

¶ 18 Finally, merger of adjacent substandard lots that come under common ownership will preserve the environment in the same ways that merger of lots already under common ownership would do. The failure

to merge would have the opposite effect, with no countervailing property value concern.[11]

Cross-appeal opposing circuit court order to grant variances and special exceptions

¶ 19 The Board argues that the circuit court improperly substituted its judgment for that of the Board, and that the Board's denials of Murr's variance and special exception requests must be affirmed under the proper standard of certiorari review.[12] *See* ***Klinger***, 149 Wis. 2d at 843. As a general rule, in certiorari proceedings the appellate court reviews the decision of the agency, not the circuit court. ***Id.*** at 845 n.6, 846.

> [WISCONSIN STAT. § 59.694(10)] explicitly allows, however, the circuit court to take evidence "if necessary for the proper disposition of the matter." The statute thus broadens the scope of review by way of certiorari by granting the circuit court discretion to take and consider evidence when it shall appear "necessary" to do so.

Id. at 846.[13] Nonetheless, if the circuit court takes evidence that is substantially the same as that taken by

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[11] The Board's response brief repeatedly refers to Murr as plaintiff. We remind counsel that references should be to names, not party designations. *See* WIS. STAT. RULE 809.19(1)(i).

[12] The Board did not file its own cross-appeal brief. Instead, it adopted the arguments set forth in the State's cross-appeal brief.

[13] ***Klinger v. Oneida Cnty.***, 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989), involved WIS. STAT. § 59.99(10) (1987-88),

the Board, deference to the Board demands that the evidentiary hearing should be treated as a nullity for purposes of determining the standard of review to be applied to the Board's decision. ***Id.*** at 845.

¶ 20 Here, the circuit court supplemented the Board record in two respects: it viewed the property and it received the Board's record concerning a variance request recently granted to a neighboring property owner. The State contends the evidence the court received was substantially the same as the evidence received by the Board and should therefore not affect the standard of review.

¶ 21 We agree the property viewing added nothing new to the evidentiary record because the Board too had visited the property. *See* ***Block v. Waupaca Cnty. Bd. of Zoning Adjust.***, 2007 WI App 199, ¶4 n.5, 305 Wis. 2d 325, 738 N.W.2d 132. We also agree that the circuit court's review of the neighbor's record did not constitute a proper basis on which the court could rely to substitute its judgment for that of the Board. *See* ***Miswald v. Waukesha Cnty. Bd. of Adjust.***, 202 Wis. 2d 401, 413-14, 550 N.W.2d 434 (Ct. App. 1996) (board of adjustment's treatment of a different property owner's variance request cannot render its action arbitrary, oppressive, or unreasonable).

¶ 22 We therefore apply the ordinary certiorari standard of review. *See* ***Klinger***, 149 Wis. 2d at 843. Murr argues the Board's decision was not reasonably

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which has been renumbered to WIS. STAT. § 59.694(10). *See* 1995 Wis. Act 201, § 479.

supported by the evidence because "the interplay of several regulations makes it impossible for the Murrs to floodproof the cabin without some type of variance or special exception permit." We conclude, however, that Murr's requests to relocate and rebuild her home in a new location were simply a matter of convenience. Personal inconvenience alone does not constitute the unnecessary hardship required to grant variances. *See* ***Snyder v. Waukesha Cnty. Zoning Bd.***, 74 Wis. 2d 468, 474-75, 478-79, 247 N.W.2d 98 (1976).

¶ 23 As the Board emphasizes, the record shows Murr could have floodproofed her current home in its existing footprint. In fact, the Board lays out two alternatives that were available to Murr, and that were presented to her early in the process. One alternative, to floodproof and remodel the existing home, would not have required any variances or special exception permits. The second, whereby Murr would demolish and reconstruct her home atop fill, would have required only two special exception permits and one variance, as compared to the seven variances or special exceptions required under her current plan.[11] Moreover, because Murr never sought the variance and special exception permits required for the second alternative, those requests are not before us for review.

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[11] Murr's eighth request, to separately develop or sell her two substandard lots, was independent of the requests necessary to relocate and reconstruct her home.

¶ 24 "We accord a presumption of correctness and validity to the decision of the board when reviewing a decision by statutory certiorari." ***Miswald***, 202 Wis. 2d at 408. Here, there was ample evidence on which the Board could reasonably rely to deny Murr's requests. *See* ***Snyder***, 74 Wis. 2d at 476 (board's findings may not be disturbed if any reasonable view of the evidence sustains them).

By the Court. – Judgment affirmed in part; reversed in part.

Recommended for publication in the official reports.

APPENDIX B

STATE OF WISCONSIN	CIRCUIT COURT	ST. CROIX COUNTY

DONNA J. MURR,

Plaintiff,

v.

ST. CROIX COUNTY BOARD OF ADJUSTMENT,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Case No. 06 CV 545

(Filed Aug. 18, 2008)

This matter came before the Court on a review of a decision of the St. Croix County Board of Adjustment. The record of the Board's proceedings was duly filed with the Court. The Court visited the property on April 4, 2007 and it reviewed the zoning department's file concerning the approval of variances for the Opitz property, which is adjacent to the Plaintiff's.

Based on the Court's review of the record and the written arguments of counsel, the Court makes the following Findings of Fact, Conclusions of Law and Order:

1) Plaintiff Donna Murr, along with her brothers and sister, (collectively referred to as the Murrs) own two residential lots in the St. Croix Cove Subdivision, Town of Troy, Wisconsin. The lots were platted before enactment of NR 118 and the County's Riverway Ordinances.

2) The recorded plat labels the Murrs' lots as Lot E (designated as Parcel "A" on the December 1, 2005 Map of Survey) and Lot F (designated as Parcel B" [sic] on the same Map of Survey). Both lots are approximately 1 1/4 acres, and they have similar terrain. The lots are bisected by a steep, wooded bluff, approximately 130 feet high. The bluff-face on the Murrs' property is not traversable by vehicle or foot, Moderately level areas exist at the bottom of the bluff near the river and at the top of the bluff.

3) Lot E is vacant. Lot F is improved with a summer home/cabin. The cabin is situated at the bottom of the steep bluff and is located approximately 100 feet from the ordinary high water mark. The location and use of the Murrs' cabin is consistent with other dwellings in the subdivision.

4) The cabin is considered a non-conforming structure under the NR118 and Riverway Ordinances currently in effect,

5) The cabin lot (Lot F) was transferred to the Murrs in 1994. The vacant lot was transferred to the Murrs in 1995.

6) Over the years, the summer home/cabin was damaged by floods from the St. Croix River.

7) The Murrs had consulted with the County Zoning Department regarding ways that the cabin could be flood proofed. The Murrs eventually sought approval for plan to elevate the cabin on fill on the

existing footprint. Certain variances and special exception permits were needed for aspects of the Murrs' flood proofing plan that went beyond the methods mentioned in St. Croix County Ordinance section 17.40D(5)(d).

8) The plans evolved after the Town of Troy Planning Commission recommended reconstruction of the Murrs' cabin on a footprint approximately 40 feet behind its current location. The proposed building site was farther from the river and situated at a higher elevation, requiring significantly less fill and excavation. The proposed plan would not require the removal of trees or result in the destruction of trees or vegetation. The cabin would be situated higher in the tree-line, further obscuring it from visibility. The Murrs submitted formal plans incorporating the Town's recommendation to the Board of Adjustment for approval of the following:

a) Variance to sell or use the adjoining vacant lot as a separate building site;

b) Variance to reconstruct and expand a nonconforming structure outside its original footprint;

c) Variance to fill, grade, and place a structure in the slope preservation zone;

d) Special exception permit to fill and grade within 40 feet of the slope preservation zone;

e) Special exception to fill and grade more than 2,000 square feet;

f) Variance to construct retaining walls and stairs inside the ordinary high-water mark setback;

g) Variance to reconstruct a patio within the ordinary high-water mark setback; and

h) Variance to construct a deck within the ordinary high-water mark setback.

9) The Board denied the Murrs' application for the reasons set forth in its written decision.

10) The Murrs commenced this action on July 25, 2006 seeking review of the Board's decision pursuant to Wisconsin Statute section 59.694(10). The Murrs and the Board submitted briefs.

11) On April 4, 2007, the Court and counsel for the Murrs and the Board visited the Murr property. During that visit, the Court saw the Opitz property, which became a significant factor in the Court's decision. Afterwards, the Court took judicial notice of the zoning department's file concerning the Opitz property and the variances that were granted to allow the Opitzes to construct a dwelling at the bottom of the bluff, comparable to the Murrs' proposal.

12) The Court finds that the Murrs suffer from a hardship because the unique terrain, limited building area and ongoing flooding make literal conformity to the zoning ordinances to be unreasonable and unnecessarily burdensome.

13) The Court finds that is unreasonable to expect the Murrs to do nothing with their cabin and allow

it to continue to flood in its present location. The Murrs cannot flood proof the cabin on its existing footprint beyond the methods mentioned in St. Croix County Zoning Ordinance section 17.40 D(5)(d) without some type of variance being granted. Similarly, the Murrs cannot reconstruct and flood proof the cabin on a different footprint at the bottom of the bluff without zoning variances.

14) Given the steep bluff, unique terrain, configuration of the lots and limited access ways, it is unreasonable and unnecessarily burdensome to force the Murrs to change the use and characteristics of the cabin and lose the benefits of having a cabin near the water (like most other properties in the St. Croix Cove) by building on top of the bluff for the sake of complying with the strict letter of the zoning restrictions.

15) The Court also finds that the county granted permission to the Opitzes to build a dwelling along the river in a similar location as the Murrs propose. For the reasons set forth in its written decision, the county granted the Opitzes similar types of variances that the Murrs requested. Based on observations made during the April 4 visit and the review of the Opitz zoning file, the Court finds that it was unreasonable for the Board to regard the Murrs' proposed plans inconsistent with the objectives and spirit of the Riverway Ordinances when the Opitzes were granted variances to build a similar structure in a similar location.

16) The Court finds that given the unique terrain of the Murrs' property, the Murrs' building proposal is

reasonable. In addition to protecting the cabin against floods, the building plan will bring the property more into compliance with the Riverway Ordinances and will promote the spirit and purpose of the ordinances by increasing the cabins' distance from the water, by removing the cabin from the flood plain, by reducing the need for excavation and fill at the building site, and by preserving the existing vegetation along the riverfront.

17) Therefore, the Court finds that the Murrs suffer from an unnecessary hardship because the Murrs were unable to protect their property against floods and comply with the strict letter of the zoning restrictions. The Court further finds that it would be unnecessarily burdensome to require the Murrs to build on top of the bluff in order to conform to the zoning restrictions. The Board erred when it denied the application as it relates to the variance requests identified above in Paragraph 8(b) through (h). The Court reverses the Board's decision on those items and directs the variances and permits to be issued.

18) The Court affirms the Board's denial of the Murrs' request to sell or use the adjoining vacant lot as a separate building site, identified above in Paragraph 8(a). The lots came into common ownership after the Riverway Ordinances were enacted, and the Board correctly interpreted the ordinance to prohibit the separate sale or use of subsized lots that are held in common ownership. That aspect of the Board's decision is affirmed.

19) This is a final order for purposes of appeal.

Dated: 8/15/08

BY THE COURT:

/s/ Edward F. Black

HONORABLE
EDWARD F. BLACK
Circuit Court Judge
St. Croix County, Wisconsin

APPENDIX C

ST. CROIX COUNTY CODE OF ORDINANCES LAND USE AND DEVELOPMENT

[Version in effect in 2006]

CHAPTER 17
ZONING

SUBCHAPTER I

GENERAL PROVISIONS

* * *

17.09 DEFINITIONS.

This section contains brief definitions of key words and phrases used throughout this chapter.

* * *

135. **Net Project Area:** Developable land area minus slope preservation zones, floodplains, road rights-of-way, and wetlands.

* * *

232. **Unnecessary Hardship:** Where special conditions affecting a particular property, which were not self-created, have made strict conformity with restrictions governing areas, setbacks, frontage, height or density unnecessarily burdensome or unreasonable in light of the purposes of this ordinance.

233. **Variance:** An authorization by the Board of Adjustment for the construction, modification or maintenance of a building or structure in a manner that deviates from dimensional standards (not uses) contained in this ordinance.

* * *

SUBCHAPTER III

SHORELAND ZONING

17.25 INTRODUCTION AND EXPLANATION.

(1) Shoreland zoning applies to all lands in all towns of the County which are within 300' of a river or stream or to the landward edge of the floodplain or within 1000' of a lake, pond or flowage or the St. Croix River. The official County zoning maps show these areas.

(2) Shoreland zoning is required by State law. The Wisconsin Department of Natural Resources exercises supervision over how these regulations are administered or changed.

(3) Owners of shoreland property along the St. Croix, Apple, Kinnickinnic and Willow Rivers should refer also to subchapter IV which contains special rules dealing with the floodplain areas along those rivers.

17.26 GENERAL PROVISIONS.

(1) STATUTORY AUTHORIZATION. Shoreland zoning is adopted pursuant to the authorization contained in §§59.971 and 144.26, Wis. Stats.

(2) FINDING OF FACTS. Uncontrolled use of the shorelands and pollution of the navigable waters of the County adversely affect the public health, safety, convenience and general welfare and impairs the tax base. The State legislature

has delegated responsibility to the counties to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structures and land uses; and preserve shore cover and natural beauty and this responsibility is hereby recognized by St. Croix County.

(3) STATEMENT OF PURPOSE. This subchapter and related provisions in this chapter and Chs. 15 and 18 have been created for the purpose of promoting and protecting the public health, safety, convenience and general welfare and to:

(a) Further the maintenance of safe and healthful conditions through:

1. Regulating septic tank use, location, installation and operation.

2. Limiting structures to those areas where soil conditions and geologic conditions will provide a safe foundation.

3. Regulating well installation and location.

(b) Prevent and control water pollution through:

1. Requiring setbacks between septic tank and soil absorption systems and watercourses.

2. Establishing minimum lot sizes to provide adequate area for private sewage disposal facilities.

3. Regulating the use of septic tanks and soil absorption systems to protect the public health, safety and general welfare.

4. Requiring alternative methods of sewage disposal where conditions make soil absorption methods unsuitable.

5. Protecting spawning grounds, fish and aquatic life through:

a. Preserving wetlands and other fish and aquatic habitat.

b. Regulating pollution sources.

c. Controlling shoreline alterations, dredging and lagooning.

6. Controlling building sites, placement of structures and land uses through:

a. Separating conflicting land uses.

b. Prohibiting certain uses detrimental to the shoreland area.

c. Setting minimum lot sizes and widths.

d. Regulating side yards and building setbacks from roadways and waterways.

e. Requiring the platting of subdivisions.

7. Preserving shore cover and natural beauty through:

a. Restricting the removal of natural shoreland cover;

b. Preventing shoreline encroachment by structures;

c. Controlling shoreland excavation and other earth moving activities;

d. Regulating the use and placement of boathouses and other structures;

e. Controlling the use and placement of signs.

* * *

SUBCHAPTER III.V, SECTION 17.36 – ST. CROIX COUNTY LOWER ST. CROIX RIVERWAY OVERLAY DISTRICT

A. TITLE, AUTHORITY AND EFFECTIVE DATE

1. TITLE

a. This subchapter shall be cited as the "Lower St. Croix Riverway Overlay District" and hereinafter referred to as the "Riverway District."

2. AUTHORITY

a. This subchapter is enacted pursuant to the authority granted by Wisconsin Statute § 30.27 and Wisconsin Administrative Code NR118.

b. The County Zoning Administrator shall administer this subchapter pursuant to Wisconsin Statute § 59.69.

c. Any mandatory amendments, repeals or recreations to the statutes pertaining to the subject matter of this subchapter are incorporated into this subchapter as of the effective date of amendment, repeal or recreation.

3. **EFFECTIVE DATE**

a. This subchapter shall be effective on July 1, 2005. Ordinance No. 696/(2005) Amendments To Section 17.36, St. Croix River Valley District And Section 17.09, Definitions.

B. PURPOSE

1. **PURPOSE**

a. The purpose of this subchapter is to promote the public health, safety, and general welfare by:

1) Reducing the adverse effects of overcrowding and poorly planned shoreline and bluff area development.

2) Preventing soil erosion and pollution and contamination of surface water and groundwater.

3) Providing sufficient space on lots for sanitary facilities.

4) Minimizing flood damage.

5) Maintaining property values.

6) Preserving and maintaining the exceptional scenic, cultural, and natural characteristics of the water and related land of the Lower St. Croix Riverway in a manner consistent with the National Wild and Scenic Rivers Act (P.L. 90-542), the Federal Lower St. Croix River Act of 1972 (P.L. 92-560) and the Wisconsin Lower St. Croix River Act (Wisconsin Statute § 30.27).

* * *

G. GENERAL PROVISIONS

1. Minimum Lot Size

a. The minimum lot size shall be governed by the base-zoning district.

b. Minimum net project area for each lot shall be at least one acre.

c. If the lot is not served by a public sewer or common system, the lot shall have adequate room for one single-family residence and two POWTS.

2. Minimum Lot Width

a. In the rural residential management zone, the minimum lot width shall be 200 feet measured at the building line and at the side of the lot nearest the river.

b. In the conservation management zone, the minimum lot width shall be 250 feet

measured at the building line and at the side of the lot nearest the river.

3. **Density Standards**

   a. There may be no more than one principal structure on each parcel.

4. **Structure Height**

   a. The maximum structure height shall be measured between the average ground elevation and the uppermost point of the structure, excluding chimneys.

      1) The maximum height for principal structures in the rural residential management zone shall be 35 feet.

      2) The maximum height for principal structures in the conservation management zone shall be 25 feet.

      3) The maximum height for accessory structures in both management zones shall be governed by the base-zoning district.

      4) Wireless communication service and other transmission facilities must meet the height requirements in Subchapter VIII of this ordinance.

5. **Structure Setbacks**

   a. On structures existing prior to the effective date of this subchapter, all setbacks shall be measured on a horizontal plane from the foundation of the structure at

the point of the structure that is nearest the Ordinary High Water Mark (OHWM), bluffline, or property line.

1) On modifications or additions to existing structures, roof overhangs shall not encroach within the required setbacks more than three feet, and any cantilevered portions of the structure must meet the required setbacks.

b. On new structures constructed after the effective date of this subchapter, all setbacks shall be measured on a horizontal plane from the roof overhang and any cantilevered portions of the structure at the point of the structure that is nearest the OHWM, bluffline, or property line.

c. All structures except docks, piers, wharves, structural erosion control measures, stairways, and lifts shall meet the following:

1) OHWM Setback: At least 200 feet from the OHWM of the Lower St. Croix River.

2) Bluffline Setback: At least 100 feet from the bluffline in the rural residential management zone, and 200 feet from the bluffline in the conservation management zone.

a) Structures that do not meet the setback may be permitted within the bluffline setback area if they

are set back at least 40 feet from the bluffline and meet all of the following standards:

i. The structure does not protrude above the bluffline as viewed from at or near the mid-line of the river or from 250 feet riverward from the OHWM whichever is less.

ii. The structure is not located in a slope preservation zone.

iii. The structure utilizes building materials that are earth tone in color and of a non-reflective nature, except that windows may be made of ordinary window glass or non-reflective glass, but may not be made of glass designed to reflect more light than ordinary window glass.

iv. The structure is visually inconspicuous.

3) Sideyard Setback: At least 25 feet from all exterior lot lines.

[Summary Of Dimensional Standards Omitted]

H. PERFORMANCE STANDARDS

1. Structure Color

a. All new, expanded, or reconstructed structures shall be earth tone in color.

b. Structures designated as historic buildings on local, State, or national historic registers or located in designated historic districts shall either be earth tone in color or colored appropriate to the period in history for which they are designated.

* * *

3. SLOPE PRESERVATION ZONE

a. No structures, except docks, piers, wharves, structural erosion control measures, stairways, and lifts may be placed in slope preservation zones.

b. Slopes greater than 12 percent may not be altered to become less than 12 percent.

c. No filling or grading is allowed in slope preservation zones that directly face and/or drain directly to the river, except the minimum required for installation of items in a. above.

* * *

I. NONCONFORMING USES AND STRUCTURES AND SUBSTANDARD LOTS

1. NONCONFORMING USES

a. These requirements shall take precedence over general zoning requirements for nonconforming uses in the Riverway District.

b. A nonconforming use may not be expanded or enlarged.

c. An increase in the volume, intensity or frequency of use is allowed if the land area or structure used for the nonconforming use are not expanded or enlarged, and if the owner provides a site plan and photographs of the site to the Zoning Administrator to be kept in a property file at the Planning and Zoning Department.

d. A change from one nonconforming use to another nonconforming use is not allowed.

e. If a nonconforming use is discontinued for a period of 12 consecutive months, any future use of buildings and premises shall conform to all of the requirements of the St. Croix County Zoning Ordinance.

2. **NONCONFORMING PRINCIPAL STRUCTURES**

a. These requirements shall take precedence over general zoning requirements for nonconforming structures in the Riverway District, except where those requirements are more restrictive, in which case the most restrictive requirements shall apply.

b. Ordinary maintenance and repair of a nonconforming principal structure is allowed.

c. Structural alteration, reconstruction and expansion of a nonconforming principal structure and replacement, improvement or structural alteration of the foundation is allowed by a land use permit if all of the applicable requirements in pars. d. and e. below are met.

d. Reconstruction of Nonconforming Principal Structures.

1) Nonconforming principal structures located within the OHWM setback area, bluffline setback area or slope preservation zone may be structurally altered or reconstructed and foundations may be replaced, improved or structurally altered if all of the following requirements are met:

a) The lot has an area of at least 7,000 square feet.

b) The altered or reconstructed structure will be visually inconspicuous or will be rendered so through mitigation per § 17.36 I.5.

c) The structure is altered or reconstructed in the same footprint as the pre-existing structure.

d) The reconstructed structure may not be any taller than the pre-existing nonconforming structure, except that a flat roof may be replaced with a pitched roof,

and may not be taller than allowed per § 17.36 G.4.

e) The color of the structure complies with § 17.36 H.1.

f) The property owner submits a mitigation plan per § 17.36 I.5.

i. If a permit is issued for the reconstruction, the mitigation plan shall be approved, or modified and approved, by the Zoning Administrator.

ii. The mitigation plan shall be incorporated into the permit and the property owner shall be required to implement the mitigation plan as a permit condition.

g) Private on-site wastewater treatment systems are brought into compliance with the requirements of the St. Croix County Sanitary Ordinance.

h) The foundation of the structure may not be replaced, improved or structurally altered, unless all of the following standards are met:

i. It is being done in conjunction with the reconstruction of the structure,

ii. It is entirely located more than 50 feet from the OHWM, and

iii. It is not located in a slope preservation zone.

i) No filling and grading activities are allowed during the alteration or reconstruction, except for the minimum necessary to accomplish the alteration or reconstruction in compliance with other provisions of this subchapter, and as needed to upgrade a private on-site wastewater treatment system, to replace sewer or water laterals, or to install storm water or erosion control measures.

j) If the structure is located in a slope preservation zone, it may be reconstructed on the existing foundation only if WDNR storm water technical standards applicable to steeper sloped areas are implemented to control erosion.

e. Expansion of Nonconforming Principal Structures.

1) Nonconforming principal structures located in the OHWM setback area or bluffline setback area may be expanded and the pre-existing foundation may be replaced, repaired or

structurally altered in conjunction with the expansion if all of the applicable following requirements are met:

a) Structures located wholly or partially within 50 feet of the OHWM may not be expanded.

b) Structures located wholly or partially within a slope preservation zone may not be expanded.

c) Structures entirely set back more than 50 feet from the OHWM but located wholly or partially less than 75 feet from the ordinary high water mark may be expanded **only** if there is no compliant building location available on the lot.

d) Structures entirely set back more than 75 feet from the ordinary high water mark may be expanded regardless of whether a compliant building location exists elsewhere on the lot.

e) The lot has an area of at least 7,000 square feet.

f) The expanded structure will be visually inconspicuous or will be rendered so through mitigation.

g) Any reconstructed portion of the nonconforming structure may

only be reconstructed in the same footprint as the pre-existing structure. Notwithstanding the definition of "reconstruction" in NR 118.03(36), the pre-existing foundation of a structure that is more than 50 feet from the ordinary high water mark and is not within a slope preservation zone may be replaced, repaired or structurally altered in conjunction with the expansion of the structure.

h) For structures located wholly or partially within the OHWM setback area, the total footprint of the structure may not exceed 1500 square feet.

* * *

4. **SUBSTANDARD LOTS**

a. Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:

1) The lot is in separate ownership from abutting lands, or

2) The lot by itself or in combination with an adjacent lot or lots under

common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.

3) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

* * *

J. ADMINISTRATION

* * *

2. SPECIAL EXCEPTION AND VARIANCE PROCEDURES

a. An application for a special exception permit or variance shall be submitted to the Zoning Administrator upon forms furnished by the County and shall include the following information as outlined in par. b. below.

b. Special exception and variance applications shall supply information adequate for the Board of Adjustment to make a decision based on the type of project to be undertaken. The applicant shall submit to the Zoning Administrator sufficient

copies of the following information for all applications:

1) General information, including but not limited to:

   a) Contact information for property owner, agent, and contractor as applicable.

   b) Legal description of the property and a general description of the proposed use or development.

   c) Information on whether or not a private water or sewage system is to be installed or upgraded.

2) For special exceptions, a detailed written explanation of how the proposed use or development meets the requirements for special exception uses as outlined in § 17.70(7)(a), § 17.36 H. as applicable, and the following standards:

   a) The scenic and recreational qualities of the Riverway District, especially in regard to the view from and use of the river.

   b) The maintenance of safe and healthful standards.

   c) The prevention and control of water pollution, including storm water runoff and sedimentation.

d) The location of the site with respect to floodplains and floodways, slope preservation zones, and blufflines.

e) The erosion potential of the site based upon degree and direction of slope, soil type, and vegetative cover.

f) Potential impact on terrestrial and aquatic habitat.

g) Location of site with respect to existing or future access roads.

h) Adequacy of proposed wastewater treatment.

i) The compatibility of the project with uses on adjacent land.

j) The use of common corridors for locating proposed facilities within or adjacent to public service facilities such as roads, bridges, and transmission services.

3) For variances, a detailed written explanation of how the requested variance meets the requirements for variances as outlined in § 17.70(5)(c)3. of this ordinance.

4) A site plan prepared by a registered land surveyor showing the following information:

a) Property location, boundaries, and dimensions.

b) Location of all existing and proposed structures and impervious surfaces with distances measured from the lot lines and centerline of all abutting streets or highways.

c) Contours on an established datum at vertical intervals of not more than two feet.

d) Blufflines, slope preservation zones, OHWM, floodway and flood fringe boundaries, and all applicable setbacks.

e) Adjoining land and water-oriented uses.

f) The location and description of existing and proposed alterations of vegetation, topography, and drainage, including grading limits and vegetation removal and replacement.

5) A recent aerial photo with property lines drawn in, showing the location of existing and proposed structures, including height and setback dimensions.

6) A mitigation plan, if required.

7) Photos of the site taken from the river slightly upstream and downstream of the property, and directly offshore.

* * *

SUBCHAPTER IV, SECTION 17.40
ST. CROIX COUNTY FLOODPLAIN OVERLAY DISTRICT

A. GENERAL PROVISIONS

1. TITLE

a. This subchapter shall be cited as the "St. Croix County Floodplain Overlay District" and is herein after referred to as the Floodplain District.

2. AUTHORITY

a. The provisions of the Floodplain District are authorized by Wisconsin Statutes §§ 59.69, 59.692, 59.694 and 87.30 and Wisconsin Administrative Code Chapter NR116 (NR 116).

b. Any mandatory amendments or repeals or recreations to the statutes pertaining to the subject matter of this ordinance are incorporated into this ordinance as of the effective date of amendment, repeal or recreation.

3. EFFECTIVE DATE

a. This ordinance shall be effective on September 30, 2005. Ordinance No. 711/(2005).

4. FINDINGS OF FACT

a. The St. Croix County Board of Supervisors finds that the uncontrolled use of the floodplain adversely affects the public health, safety, convenience, general welfare, land values and tax base of St. Croix County.

b. In addition, substantial public expenditures may be required for the protection, rescue and relief of persons and property in areas subject to periodic flooding.

c. Uncontrolled filling and construction have been determined to be the major causes of adverse effects.

d. The effects of a single fill or other single project upon flood heights, velocities, or floodplain storage areas may be relatively insignificant, but the combined effects of a number of such projects may drastically increase the potential for injury or damage from flooding. Without a thorough analysis of proposed development it is not possible to adequately assess impacts.

5. PURPOSE

a. The purpose of this ordinance is to promote and protect public health, environment, safety and general welfare and to further the maintenance of safe and healthful conditions for the people and communities within the County.

b. Protect life, health and property.

c. Minimize expenditures of public funds for flood control projects.

d. Minimize development in a floodplain which would obstruct flood flows and decrease the storage capacity of the floodplain.

e. Minimize rescue and relief efforts undertaken at the expense of the taxpayers.

f. Minimize business interruptions and other economic disruptions.

g. Minimize damage to public facilities.

h. Broadening the property tax base of the County by enhancing property values.

i. Discourage the victimization of unwary home and land buyers.

j. Prevent conflicts between neighbors.

k. Minimize the occurrence of future flood blight areas in the floodplain.

l. Prevent increases in flood heights that could increase flood damage and result in conflicts between property owners.

m. Discourage development in a floodplain if there is any practicable alternative to locate the activity, use or structure outside of the floodplain.

* * *

SUBCHAPTER VII

ADMINISTRATION AND ENFORCEMENT

17.70 ADMINISTRATION.

* * *

(5) BOARD OF ADJUSTMENT.

* * *

(c) Powers and Duties. The Board of Adjustment shall:

1. Adopt such rules as it considers desirable for the conduct of business, subject to the provisions of this section and relevant State Statutes.

2. Hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement or administration of this chapter. All such appeals shall be governed by the provisions of sub. (6).

3. Grant variances from the strict terms of this chapter as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the chapter will result in unnecessary hardship so that the spirit of the chapter shall be observed and substantial justice done. Variances shall be granted only subject to the provisions of sub. (6). No variance shall have the effect of allowing in any district uses not permitted in that district.

* * *

(6) PROCEDURES.

* * *

(c) Hearings on Appeals, Variances, Special Exceptions. Upon the filing with the Board of an appeal from a decision of the Zoning Administrator or deputy administrator, an application for a special exception or a variance, the Board shall hold a public hearing. The Board shall fix a reasonable time for the hearing and publish a Class 2 notice under Ch. 985, Wis. Stats., as well as giving due notice by mail to all the parties in interest. When the matter concerns the shoreland or floodplain regulations the Board shall submit to the Department of Natural Resources a copy of the notice and application for the proposed variance or special exception sufficiently in advance so that the Department of Natural Resources will receive at least 10 days notice of the hearing. At the hearing any party may appear in person or by agent or attorney and present written and oral evidence for the record.

(d) Decisions on Appeals, Variances or Special Exceptions. The Board shall arrive at a decision on such appeal, special exception or variance within a reasonable time. In passing upon an appeal the Board may, so long as such action is in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or modify the

order, requirement, decision or determination appealed from and it shall make its decision in writing setting forth the findings of fact and the reasons for its decision. A copy of all decisions granting variances or special exceptions affecting any provision of the shoreland or floodplain regulations shall be forwarded to the Department of Natural Resources within 10 days of such action.

(e) A variance shall not:

1. Grant, extend or increase any use prohibited in the zoning district.

2. Be granted for a hardship based solely on an economic gain or loss.

3. Be granted for a hardship which is self-created.

4. Damage the rights or property values of other persons in the area.

5. Allow actions without the appropriate amendments to this ordinance or its associated map(s)

6. Allow any alteration of an historic structure, including its use, which would preclude its continued designation as an historic structure.

(f) Conditions Attached to Variances. In granting a variance, the Board of Adjustment may prescribe appropriate conditions and safeguards which are in conformity with the purposes of this

chapter. Violations of such conditions and safeguards when made a part of the terms under which the variance is granted shall be deemed a violation of this chapter.

APPENDIX D

St. Croix County Zoning Ordinance
St. Croix River Valley District
As Enacted June 19, 1975

* * *

3.10.8 Pre-existing parcels Parcels of record in the Register of Deeds Office on the effective date of this Ordinance which do not allow the project to meet the standards of sec. 3.10 may be allowed as building sites as a special exception provided that lands abutting the parcel in question are not under ownership or control of the applicant and provided that the setback from bluffline, which must be set by the Board, will not be reduced to less than 40 feet and that all buildings will be setback at least 75 feet, from normal high water elevation, that the proposed use complies with flood-plain zoning and sanitary standards, and that a minimum net project area of (1) acre per dwelling unit is provided on the site. The Board may modify the minimum bluffline setback line and the net project area specified above upon a finding that the proposed building will not be visually conspicuous from the waterlevel in the channel of the St. Croix River under summer vegetative conditions.

* * *

St. Croix County Zoning Ordinance
St. Croix River Valley District (September 1978)

* * *

3.12 St. Croix River Valley District

H. Pre-Existing Parcels.

1. Parcels of record in the Register of Deeds Office on the effective date of this Ordinance which do not allow the project to meet the standards of Section 3.12 may be allowed as building sites as a special exception provided that lands abutting the parcel in question are not under ownership or control of the applicant and provided that the setback from bluffline, which must be set by the Board, will not be reduced to less than forty (40) feet and that from all buildings will be set back at least 75 feet from normal high water elevation, that the proposed use complies with flood plain zoning and sanitary standards, and that a minimum net project area of one acre per dwelling unit is provided on the site. The Board may modify the minimum bluff line setback line and the net project area specified above upon a finding that the proposed building will not be visually conspicuous from the water level in the channel of the St. Croix River under summer vegetative conditions.

2. Justification for a reduced setback shall be based on limitations imposed by the physical characteristics of the property, not on the economic or other conditions of the applicant.

* * *

St. Croix County Zoning Ordinance
St. Croix River Valley District (October 1986)

* * *

17.36 St. Croix River Valley District

* * *

(5) PERFORMANCE STANDARDS. No structure, land, or water shall hereafter be used except in compliance with the general provisions of this Chapter and with the following performance standards:

* * *

(n) Substandard Lots. Lots of record in the Register of Deeds office on January 1, 1976, or the date of enactment of an amendment to this section, which do not meet the requirements of §NR 118.06, Wis. Adm. Code, may be allowed as building sites provided that:

1. The lot is in separate ownership from abutting lands or, if lots in an existing subdivision are in common ownership, each of the lots has at least one acre of net project area.

2. The proposed use conforms to the requirements of these rules and any underlying zoning or sanitary code requirements.

* * *

APPENDIX E

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2008-AP-2728

Donna J. Murr

Petitioner-appellant-cross respondent,

v.

St. Croix County Board of Adjustment,

Respondent-respondent-cross appellant,

and

State of Wisconsin,

Appellate intervenor-respondent-cross appellant.

BRIEF OF PETITIONER-APPELLANT-CROSS RESPONDENT DONNA J. MURR

(Filed October 30, 2009)

An appeal from an order of the Circuit
Court of St. Croix County,
Honorable Edward F. Vlack

MUDGE PORTER LUNDEEN & SEGUIN, S.C.
Attorneys for Petitioner-appellant-cross respondent

BY: R. Michael Waterman
State Bar No. 1025674

110 Second Street
P.O. Box 469
Hudson, WI 54016
(715) 386-3200

* * *

ARGUMENT

THE BOARD OF ADJUSTMENT ERRED – THE COUNTY ORDINANCE DOES NOT RESTRICT THE SALE OR DEVELOPMENT OF THE VACANT LOT.

The Murrs own two adjacent lots. One lot contains the summer home/cabin, and the other is vacant. The lots had separate owners when the ordinance was enacted. (R. 3 – hearing exhibit 4; R. 31 – BOA transcript pp. 36, 40). Each lot is now considered a "substandard lot" under the Lower St. Croix Riverway Ordinances because they each has less than one acre of net project area. (R. 31 – BOA transcript p. 4). The Murrs have considered selling the adjacent, vacant property, and they have considered developing the lot for themselves. They have been prevented from doing so because of ordinance language that restricts adjoining substandard lots in common ownership. The Murrs filed an application for a variance, but it may be better characterized as an appeal of the zoning office's interpretation. The Murrs do not believe the ordinance restricts their use of the lot. (R. 3 – BOA hearing exhibit 2, application materials; R. 31 – BOA transcript p. 3).

* * *

The St. Croix Cove Subdivision, and hence the Murrs' lots, were created in the 1950s. (R. 3 – BOA hearing exhibit 1, Staff Report p. 2). The record contains undisputed evidence that the lots did not have common owners until sometime after January 1, 1976, the determinative date set forth in the ordinance. The April 12, 2005 email from Attorney Kenneth Rohlf, which was received by the Board as Exhibit 4, showed that William and Margaret Murr acquired Parcel B in 1960. In 1961, they transferred title to William Murr Plumbing, Inc. In 1963, William and Margaret Murr acquired the vacant Parcel A. (R. 3 – BOA hearing exhibit 4; *see also* R. 31 – BOA transcript p. 40).

Parcel A was titled in the Murrs' parents and Parcel B was titled in a corporation for decades.[1] In 1994 Parcel B was transferred to the Murr children. In 1995, Parcel A was transferred to them. (R. 31 – BOA hearing exhibit 1, Staff Report p. 2).

* * *

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court concerning the Board's enforcement and application of Ordinance section 17.36(I) (4).

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[1] For the sake of full disclosure, Parcel B was transferred from William Murr Plumbing, Inc. back to William and Margaret Murr in 1982. That transfer was not detailed at the board of adjustment hearing, and appellants share this information out of candor to the court. This transaction does not affect the Murrs' arguments or resolution of this issue.

Dated:_____

MUDGE, PORTER, LUNDEEN & SEGUIN, S.C.
Attorneys for petitioner-appellant-cross respondent

_____
BY: R. Michael Waterman
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APPENDIX F

St. Croix County Board of Adjustment
Hearing Date: March 23, 2006
APPLICATION #5; Special Exception & Variances

Applicant:	Donna Murr (Et Al), property owners
Site Address:	202 Cove Court, River Falls, WI 54022
Property #s:	24.28.20.611G, 24.28.20.611 G-1
Computer #s:	040-1155-80-000, 040-1155-85-000
Location:	Part of Government Lot 2 in Section 24, T28N, R20W, Town of Troy
Zoning:	Ag Residential District and Lower St. Croix Riverway District
Lot Sizes:	2.52 acres total
Requests:	**Item #1:** Variance to use two contiguous substandard lots in common ownership in the Lower St. Croix Riverway District as separate building sites and reconfigure the lot lines pursuant to Section 17.36 I.4.a.1-3 of the St. Croix County Zoning Ordinance.
	Item #2: Variance to reconstruct and expand a nonconforming principal structure without using the same footprint as the original structure in the Lower St. Croix Riverway District pursuant to Section 17.36 1.2.e.1(g) of the St. Croix County Zoning Ordinance.
	Item #3: Variance to the 15-foot floodfringe fill standard in the Floodplain District pursuant to Section 17.40

G.3.B.1 of the St. Croix County Zoning Ordinance.

Item #4: Variance to construct retaining walls and stairs that encroach within the 200' OHWM setback in the Lower St. Croix Riverway District pursuant to Section 17.36 G.5.c.1 of the St. Croix County Zoning Ordinance.

Item #5: Special exception request for filling and grading in excess of 2000 square feet in the Shoreland District pursuant to Section 17.29(2)(c)3 of the St. Croix County Zoning Ordinance.

Item #6: Variance to reconstruct a concrete patio (a nonconforming accessory structure) in the Lower St. Croix Riverway District pursuant to Section 17.36 I.3.b of the St. Croix County Zoning Ordinance.

Item #7: Variance to construct a deck within the 200' OHWM setback in the Lower St. Croix Riverway District pursuant to Section 17.36 G.5.c.1 of the St. Croix County Zoning Ordinance.

Exhibits:

1) Staff Report

2) Applications for Special Exception and Variances with Supporting Materials

3) Photos

4) E-mail from Alex Blackburn, April 12, 2005

5) Revised Survey Maps from Jon Sonnentag, dated March 10, 2006

6) E-mail from the Town of Troy, dated March 10, 2006

7) Letter from the Land and Water Conservation Department, dated March 14, 2006

8) Letter from the Wisconsin Department of Natural Resources, dated March 14, 2006

9) Correspondence between staff and the applicants, December 2004-March 2006

10) Storm Water Management Plan, submitted March 14, 2006

BACKGROUND:

The applicants currently own a nonconforming principal structure on two contiguous substandard lots within the Shoreland, Lower St. Croix Riverway, and Floodplain overlay districts in the Town of Troy. The applicants' parents purchased the lots and one small parcel with a boathouse on it in 1960, 1963, and 1965 (Exhibit 4) and ownership was transferred to their five children in 1995. The children would now like to use the lots as two separate building sites and wish to reconfigure the lot lines in a manner that establishes one

lot with the current home site on the beach (Lot 1) and another lot above the bluff (Lot 2) that could potentially be sold and developed in the future. The Lower St. Croix Riverway District prohibits the sale and/or development of contiguous substandard lots in common ownership unless each lot has at least one acre of net project area. The applicants are applying for a variance to these standards **(Item #1)**. As the lots exist today, they have a combined total of less than one acre of net project area, the majority of which is above the bluffline. The proposed reconfiguration would result in one lot (Lot 1) almost entirely within the floodplain or slope preservation zone, with less than a quarter acre of net project area, none of which is buildable. A summary of the lot reconfiguration follows (please see Exhibit 5 for drawings of all existing and proposed lots):

	Total Acres	**Total NPA**
Existing Parcel A	1.27	~0.50
Existing Parcel B	1.25	~0.48
Proposed Lot 1	1.26	~0.24
Proposed Lot 2	1.26	~0.72

As part of the request, the applicants also wish to tear down the existing nonconforming principal structure on the beach and reconstruct and expand it to a total footprint of 1402 square feet. The existing home has a footprint of 750 square feet and is located 86 feet from the OHWM of the St. Croix River. The proposed reconstruction and expansion meets all of the requirements in the Riverway District, except that the reconstructed portion will not be in the same footprint as the existing

structure (Exhibit 2, Proposed Grading Plan). The applicants are requesting a variance to use approximately 70 percent of the existing structure's footprint **(Item #2)**. The closest point of the new footprint to the river will be several feet back from the closest point of the existing footprint and will extend an additional 15 feet to the west and slightly into the slope preservation behind the house, which is not allowed in the Riverway District. Landward expansion is not possible due to the presence of an existing well, steep slopes, and a private drive behind the home. The applicants plan to install a holding tank for their sanitary system since the entire home site is either within the floodplain or slope preservation zone.

The existing home is also located entirely within the floodplain and the lowest floor of the home is approximately six feet below the required flood protection elevation. Because the home is located in the floodplain, specifically the "floodfringe", the new home will have to be elevated on 5-6 feet of fill to bring it above the flood protection elevation for a distance of 15 feet from the foundation in all directions as required in the Floodplain District. Due to the natural characteristics and layout of the site, specifically the presence of mature trees that would have to be removed and the close proximity of the home to the administrative floodway and adjacent property lines, the applicants cannot extend the fill out this far and are requesting a variance to the fill standard **(Item #3)**. The applicants have submitted a hydraulic study prepared by an engineer indicating that the proposed amount of fill encroaching

within the administrative floodway boundary will not cause an increase to the regional flood elevation. To hold the fill in place, the applicants are proposing to construct retaining walls that will encroach within the OHWM setback, which requires another variance in the Riverway District **(Item #4)**. The applicants also need a special exception permit for filling and grading a total area of approximately 6600 square feet in the Shoreland District **(Item #5)**. Because the fill will extend into the slope preservation zone behind the existing home, the applicants technically need another variance for filling and grading on a slope preservation zone, as well as a special exception permit for filling and grading within 40 feet of a slope preservation zone in the Riverway District, which they will apply for next month pending approval of their project.

The applicants wish to reconstruct a patio that will be buried by the fill and are requesting a variance for this **(Item #6)**. The new patio will be smaller than the existing patio and will be located above the second-tier of retaining walls. The existing patio is approximately 975 square feet, and the new patio will be approximately half of this size. Part of the patio will extend over the footprint of the existing home. As part of the plans, the applicants are also proposing to construct a deck on the riverward side of the new home that will encroach within the OHWM setback **(Item #7)**. The deck will be approximately 150 square feet and will be constructed within the footprint of the existing home.

The applicants have been meeting with staff for over a year to explore different options that would meet their

goals while also meeting the standards and requirements of the Shoreland, Floodplain, and Lower St. Croix Riverway overlay districts. The applicants' goals include:

1. Reconstructing the home out of the floodplain to reduce flood damage,
2. Saving as many trees on the site as possible,
3. Making the home as inconspicuous from the river as possible,
4. Providing a safe, clean and mold-free living environment for their family, and
5. Keeping the river clean.

Staff has presented the following options that meet all of these goals and would not require any variances:

1. Tearing down the existing home and building a new home on top of the bluff, which would meet all of the applicants' goals as well as all required setbacks. The applicants did not wish to pursue this alternative because they prefer to keep their home on the beach and hope to be able to reconfigure their lot lines and sell the building site above the bluff as a separate lot.
2. Improvements to the existing home as allowed in the Riverway District, provided the improvements are kept under 50 percent of its present equalized assessed value as allowed in the Floodplain District. As part of this alternative, the applicants would be able to exclude the costs of flood proofing the lowest

floor of their existing home. The applicants did not wish to pursue this alternative because they would not be able to add a second story to the home to make up for the lost living space. They also felt that this was not a practical alternative due to damage and mold caused by past flooding that may require more extensive improvements.

Staff informed the applicants that, if other alternatives were available to them that would not require variances, they would have a difficult time demonstrating a hardship (Exhibit 9). During these meetings, staff also informed the applicants that they would not be able to use or sell their substandard lots as separate building sites or reconfigure them as they wished since such use of substandard lots is prohibited in the Riverway District and would thus constitute a "use" variance.

GOVERNMENTAL AGENCY REVIEW:

Town of Troy: A Town representative joined staff on the site visit. The Town is in the process of reviewing the application under the terms of its Riverway Ordinance. The Town does not plan to submit comments (Exhibit 6).

St. Croix County Land and Water Conservation Department: Steve Olson has reviewed the plans and visited the site, and recommends denial of the variances and special exception permit. He will be available at the hearing to answer questions (Exhibit 7).

Wisconsin Department of Natural Resources: Eunice Post and Gary Lepak have reviewed the plans and visited the site, and recommend denial of the variances and special exception permit. They will be available at the hearing to answer questions (Exhibit 8).

Federal Emergency Management Agency: Tira Miller and Dave Schein have spoken with staff about this project and received copies of the application for their review. They have not yet submitted comments.

SITE REVIEW:

The properties adjacent to this site are zoned Ag Residential and are in the Lower St. Croix Riverway, Shoreland and Floodplain overlay districts. They feature predominantly seasonal and year-round residential development, as well as some open space on a large undeveloped parcel to the west. At least five other property owners along Cove Road own two contiguous substandard lots.

STAFF SUMMARY:

Item #1: Section 17.36 I.4.a.1-3 of the Ordinance states that lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to the Riverway District that makes the lot substandard, which do not meet the requirements of the district, may be allowed as building sites provided that the following criteria are met:

1. The lot is in separate ownership from abutting lands, or

2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.

3. All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

Item #2: Section 17.36 I.2.e.1(g) of the Ordinance states that any reconstructed portion of a nonconforming principal structure in the Riverway District may only be reconstructed in the same footprint as the preexisting structure.

Item #3: Section 17.40 G.3.B.1 of the Ordinance states that any habitable structure in the Floodplain District which is to be erected, constructed, reconstructed, altered, or moved into the floodfringe area for residential use, shall meet or exceed the following standards:

> The elevation of the lowest floor, excluding the basement or crawlway, shall be 2 feet or more above the regional flood elevation on fill. The fill shall be one foot or more above the regional flood elevation extending at least 15 feet beyond the limits of the structure. Other flood proofing

measures may be approved if the elevations of existing streets or sewer lines makes compliance impractical and the Board of Adjustment grants a variance consistent with flood proofing standards in Section 17.40 D.5 of the Ordinance.

Items #4 and #7: Section 17.36 G.5.c.1 of the Ordinance states that all structures in the Riverway District must be at least 200 feet from the OHWM of the Lower St. Croix River.

Item #5: Section 17.29(2)(c)3 of the Ordinance requires a special exception permit for filling and grading in excess of 2000 square feet in the Shoreland District.

Item #6: Section 17.36 I.3.b of the Ordinance states that nonconforming accessory structures, other than sheds or garages, may not be structurally altered, reconstructed or expanded. Patios, whether pervious or impervious, are defined as "at-grade" accessory structures pursuant to Section 17.09 of the Ordinance.

Section 17.36 1.5 of the Ordinance requires an erosion and sediment control plan, storm water management plan, and vegetation management plan as mitigation for reconstruction or expansion of nonconforming structures in the Riverway District.

Variance Criteria

The Board of Adjustment has the authority to issue a variance only when the Ordinance and statutory criteria are satisfied. Those criteria are prescribed by the St. Croix County Zoning Ordinance, Sections 17.70(5)(c)3 and 17.70(6)(e) and Wisconsin State Statutes Section 59.694 as follows:

> Section 17.70(5)(c)3: Grant variances from the strict terms of this chapter as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the chapter will result in unnecessary hardship so that the spirit of the chapter shall be observed and substantial justice done. Variances shall be granted only subject to the provisions Sub (6). No variance shall have the effect of allowing in any district uses not permitted in that district.
>
> Section 17.70(6)(e): A variance shall not:
>
> 1. Grant, extend or increase any use prohibited in the zoning district.
> 2. Be granted for a hardship based solely on an economic gain or loss.
> 3. Be granted for a hardship which is self-created.
> 4. Damage the rights or property values of other persons in the area.
> 5. Allow actions without the appropriate amendments to this ordinance or its associated map(s).

6. Allow any alteration of an historic structure, including its use, which would preclude its continued designation as an historic structure.

Section 59.694(7)(c): To authorize upon appeal in specific cases variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

Section 17.40 I.6 of the St. Croix County Zoning Ordinance further requires that the Board of Adjustment may, upon appeal, grant a variance from the standards in the Floodplain District if the following criteria are met:

1. Literal enforcement of the ordinance provisions will cause unnecessary hardship.

2. The hardship is due to adoption of the floodplain ordinance and unique property conditions, not common to adjacent lots or premises. In such case the ordinance or map must be amended.

3. The variance is not contrary to the public interest.

4. The variance is consistent with the purpose of this Ordinance.

Special Exception Standards

Section 17.70(7)(a) of the Ordinance stipulates that the Board of Adjustment shall only grant special exceptions subject to the following provisions:

1. No granting of a special exception shall violate the spirit or general intent of this Chapter.

2. No special exception shall be allowed which would be contrary to the public health, safety, or general welfare or which would be substantially adverse to property values in the neighborhood affected.

3. No use shall be permitted by special exception that would constitute a nuisance by reason of noise, dust, smoke, odor, or other similar factors.

4. The Board shall also apply standards set forth in other sections of this Chapter, which apply to particular classes of special exceptions.

Additionally, Section 17.70(7)(c) stipulates that the Board of Adjustment shall not approve a special exception in the Shoreland District without specific consideration of the following items:

1. The maintenance of safe and healthful standards.

2. The prevention and control of water pollution including sedimentation.

3. Existing topographic and drainage features and vegetative cover on the site.

4. The location of the site with respect to floodplains and floodways of rivers and streams.

5. The erosion potential of the site based upon degree and direction of slope, soil type and vegetative cover.

6. The location of the site with respect to existing or future access to roads.

7. The need of the proposed use for shoreland location.

8. Its compatibility with uses on adjacent land.

9. The amount of liquid wastes to be generated and the adequacy of the proposed disposal systems.

10. Locational factors under which:

    a. Domestic uses shall be generally preferred.

    b. Uses not inherently a source of pollution shall be preferred over uses that are or may be a pollution source.

    c. Use locations within an area tending to minimize the possibility of pollution shall be preferred over use locations tending to increase the possibility.

Section 17.36 J.2.b)2) states that special exception uses in the Lower St. Croix Riverway District must take into account the following standards in addition to those listed for the Shoreland District (as applicable):

- The scenic and recreational qualities of the Riverway District, especially in regard to the view from and use of the river (Section 17.36 J.2.b)2)a)).
- Potential impact on aquatic and terrestrial habitat (Section 17.36 J.2.b)2)f)).

Regarding filling and grading, Section 17.29(5) of the Ordinance states that the Board of Adjustment may attach the following conditions to a special exception permit as applicable:

(a) The smallest amount of bare ground be exposed for as short a time as possible.

(b) Temporary ground cover such as mulch be used and permanent such as sod be planted.

(c) Diversions, silt basins, terraces and other methods to trap sediments be used.

(d) Fill be stabilized according to accepted engineering standards.

Board of Adjustment Direction

The Board of Adjustment, after contemplating all relevant information, may do one of the following:

1. Recommend approval of the request.
2. Recommend denial of the request.
3. Table/postpone the decision to absorb information gathered or request additional information.

The Board of Adjustment must stipulate findings to support their variance and special exception decisions (for approval or denial).

STAFF FINDINGS AND CONCLUSIONS OF LAW:

General Findings:

Staff offers the following findings and conclusions of law pertinent to the special exception and variance requests for the Board's consideration:

1. The applicant is Donna Murr (Et Al) [sic], property owners, 8897 Campton Drive, Inver Grove Heights, MN 55076.

2. The address of the site is 202 Cove Road, River Falls, WI 54022.

3. The site is located in part of Gov. Lot 2, Section 24, T28N, R20W, Town of Troy, St. Croix County, WI.

4 The Land & Water Conservation Department recommends denial of the project in its entirety.

5. The Wisconsin Department of Natural Resources recommends denial of the project in its entirety due to lack of a demonstrated hardship and failure to meet the spirit and intent of the Ordinance.

Item #1 (Substandard Lot) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #1 for the Board's consideration:

6. The applicants filed an application with the Board of Adjustment for a variance to use two contiguous substandard lots in common ownership in the Lower St. Croix Riverway District as separate building sites and reconfigure the lot lines.

7. Denying this variance would not deprive the applicants of reasonable use of their property because their contiguous substandard lots can be developed and sold jointly as a single, more conforming parcel that is more suitable for residential development.

8. Granting this variance would allow a use that is prohibited in the Lower St. Croix Riverway District; specifically, the use of two contiguous substandard lots in common ownership as separate building sites.

9. Granting this variance would not meet the spirit and intent of the Lower St. Croix Riverway District, which limits the use of substandard lots for the purpose of reducing the adverse affects of overcrowding and poorly planned shoreline and bluff area development. Other purposes of the Lower St. Croix Riverway District that would not be met by granting this variance include preventing soil erosion and pollution and contamination of surface water and ground water; providing

sufficient space on lots for sanitary facilities; minimizing flood damage; maintaining property values; and preserving and maintaining the exceptional scenic, cultural, and natural characteristics of the water and related land of the Lower St. Croix Riverway in a manner consistent with the National Wild and Scenic Rivers Act and the Federal and Wisconsin Lower St. Croix River Acts.

10. Granting this variance is not consistent with the National Wild and Scenic Rivers Act, which was created to protect rivers, including the Lower St. Croix River, that, "*with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, and other similar values, and shall be preserved in free-flowing condition, and protected for the benefit and enjoyment of present and future generations*".

11. The fact that the applicants have paid property taxes on both lots and may wish to sell one of the lots in the future does not constitute a hardship, which cannot be based solely on an economic gain or loss.

12. The applicants' lots, either separate or combined, do not have one acre of net project area, which is a requirement outlined in the County Ordinance and in Wisconsin State Administrative Code NR 118, from which the County cannot be less restrictive. Furthermore, the proposed reconfiguration of the existing lots would result in a self-created hardship on Lot

1, which will have no building envelope and will require a variance to build on.

13. The application of these standards in the Ordinance is not unique to this property since they apply to all substandard lots within the Riverway District, not just the applicants'. Thus, a variance is not necessary to secure to the applicants similar rights to neighboring landowners (some of whom own contiguous adjacent substandard lots and some of whom don't) since all landowners in the Riverway District are subject to the same rules and regulations.

14. Denying this variance will not damage the rights or property values of other persons in the area since they are subject to the same rules and regulations as the applicants. The rules and regulations are intended to protect existing property owners and the general public from the adverse affects of overcrowding and poorly planned development in the Riverway District.

Item #2 (Reconstruction and Expansion Outside of Footprint) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #2 for the Board's consideration:

15. The applicants filed an application with the Board of Adjustment for a variance to reconstruct and expand a nonconforming principal structure without using the same footprint as

the original structure in the Lower St. Croix Riverway District.

16. The applicants have not demonstrated an unnecessary hardship since they could feasibly use the same footprint as the existing structure for the reconstructed portion of the home. Furthermore, literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new building that meets the requirements of all applicable overlay districts.

17. The applicants are not requesting minimal relief since approximately 30 percent of the new footprint will be outside of the existing footprint.

18. Granting this variance would not meet the spirit and intent of the St. Croix Riverway District, the intent of which is to allow property owners to rebuild what they have in the same footprint with reasonable expansion needed, and at the same time reduce the adverse impacts of existing, poorly planned development. Even though the proposed new footprint would be further back from the river than the original, it would require more filling and grading and tree removal in the sensitive shoreline area than using the original footprint because it is being moved and extended further west (parallel to the river) and a patio and deck are proposed over the remaining riverward portion of the original footprint

(Items #6 and #7). The proposed footprint also extends into the slope preservation zone, which is prohibited. Thus, adverse impacts will increase, not be reduced, and will negatively affect the scenic and natural characteristics of the water and related land of the river.

19. The Ordinance limits filling and grading associated with reconstructing or altering a nonconforming principal structure to only the minimum necessary to accomplish the reconstruction or alteration in compliance with other provisions of the Riverway District. Moving the footprint is not in compliance with the provisions of the Riverway District and will require additional filling and grading. Also, the extensive filling and grading required to elevate the home on fill to meet floodfringe standards will increase the negative environmental and visual impacts on the river.

Item #3 (Floodplain Fill) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #3 for the Board's consideration:

20. The applicants filed an application with the Board of Adjustment for a variance to the 15-foot flood fringe fill standard in the Floodplain District in order to elevate their home on fill extending out from the foundation to a distance of less than 15 feet.

21. The elevation of existing streets or sewer lines (the applicants have a private on-site wastewater treatment system) does not make compliance with the fill requirements impractical; rather, it is the existence of trees, the close proximity of the administrative floodway boundary, and the close proximity of neighboring property lines that makes compliance impractical.

22. The request does not meet all of the criteria for granting a variance. This request meets the spirit and intent of the Ordinance by elevating the home above the RFE without causing any increase in the regional flood elevation (RFE) as indicated by the hydraulic study submitted by the applicants, and will provide minimal relief to the floodplain standards. However, literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new building above the RFE. The applicants also have the option of keeping their existing home in its current location and floodproofing and improving it to a value not to exceed 50 percent of its present equalized assessed value.

Item #4 (Retaining Walls and Stairs in the OHWM Setback) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #4 for the Board's consideration:

23. The applicants filed an application with the Board of Adjustment for a variance to construct retaining walls with stairs that encroach within the 200' OHWM setback in the Lower St. Croix Riverway District for the purpose of holding back fill.

24. The applicants are not requesting minimal relief since the retaining walls and stairs will encroach approximately 125 feet into the required OHWM setback. The walls could feasibly encroach less, with the foundation of the house essentially serving as part of the retaining wall.

25. Literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new [sic] above the RFE that will not need fill held back by retaining walls and that better meets the spirit and intent of the Riverway District. Personal preference to keep the home on the beach does not constitute a hardship.

26. Granting this variance would not meet the spirit and intent of the Ordinance since it would allow for more visible structural encroachment closer to the OWHM setback than what currently exists on the site, and would dramatically alter the natural appearance and ecology of the shoreline.

27. It is not known whether or not the retaining walls will be designed to withstand flood pressures, depths, velocities, uplift, and impact

forces, and other regional flood factors as required for all structures in the Floodplain District. Improper design could potentially lead to greater negative environmental impacts and flood damage, which would not be in the public interest.

Item #5 (Grading and Filling in the Shoreland) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #5 for the Board's consideration:

28. The applicants filed a special exception request for filling and grading in excess of 2000 square feet in the Shoreland District in order to elevate their new home on fill as required in the Floodplain District.

29. Granting this special exception would violate the spirit and intent of the Shoreland and Riverway Districts since the amount of fill would substantially increase the ground elevation close to the OHWM. This will dramatically change the topography, drainage, natural appearance, and ecology of the shoreline. It will also require the removal of several mature trees within the OHWM setback and could lead to damage of the remaining trees from excavating and construction activities, as well as a reduction of terrestrial shoreland habitat. Finally, the end result of bringing in so much fill will be a structure that, while elevated to meet the floodplain standards, is much higher and more visible from the river

than what currently exists, thus detracting from the scenic and recreational value of the Lower St. Croix River Valley.

30. Granting this special exception permit would be contrary to the public health, safety, and general welfare and potentially be adverse to property values in the neighborhood affected. While the hydraulic analysis submitted by the applicants indicates that the fill extending into the administrative floodplain boundary will not increase the RFE, it still has the potential to reduce the storage capacity of the floodplain (particularly when considering the cumulative impact of numerous fill projects in the floodplain of the river) and could potentially lead to increased flood damage on properties upstream and downstream.

Item #6 (Reconstructing a Nonconforming Patio) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #6 for the Board's consideration:

31. The applicants filed an application with the Board of Adjustment for a variance to reconstruct an accessory concrete patio that encroaches within the 200' OHWM setback in the Lower St. Croix Riverway District.

32. The request does not meet all of the criteria for granting a variance. With conditions for storm water management and landscaping, the patio could meet the spirit and intent of the Ordinance in that it would not be visible

from the river, would not lead to an increase in storm water runoff, and would encroach less than the existing patio. However, literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new building and patio that meets the requirements of all applicable overlay districts and better meets the spirit and intent of the Ordinance.

Item #7 (Deck in the OHWM Setback) Findings and Conclusions:

Staff offers the following findings and conclusions of law pertinent to Item #7 for the Board's consideration:

33. The applicants filed an application with the Board of Adjustment for a variance to construct a deck within the 200' OHWM setback in the Lower St. Croix Riverway District.

34. The request does not meet all of the criteria for granting a variance. With conditions for vegetative screening, the deck would meet the spirit and intent of the Ordinance in that it could be made visually inconspicuous and would not lead to an increase in storm water runoff, and would encroach no more than the existing home. However, literal enforcement of the Ordinance would not result in unnecessary hardship since the applicants have another compliant building site on their lot where they could construct a new building

with an attached deck that meets the requirements of all applicable overlay districts and better meets the spirit and intent of the Ordinance.

STAFF RECOMMENDATION:

Based on these findings of fact and conclusions of law, staff recommends denial of the entire project (Items #1-#7). The applicants' property falls within three overlay districts: Shoreland, Floodplain, and Lower St. Croix Riverway. While some components of the applicants' request may be allowed as proposed in one district, the project in its entirety cannot meet the standards in all three districts. In fact, compliance with standards in one district (particularly the Floodplain District) results in noncompliance with standards in the other districts. While the applicants' desire to develop two lots and reconstruct a larger home on the beach is very understandable, doing so would not minimize the impacts of the development as it exists today; but rather would result in additional development and extensive alterations close to the shoreline in a very sensitive and protected area, the St. Croix River Valley. The cumulative impacts to the scenic and natural characteristics of this outstanding public resource are simply too great.

In the event that the Board of Adjustment makes findings of fact and conclusions of law that support approval of any or all of these requests, staff recommends the following conditions for your consideration:

1. Approval for these variances and special exception permits does not include any filling, grading, vegetation removal, development, or other activities not indicated in the application and plans submitted on February 6, 2006.

2. Prior to commencing construction, the applicants shall secure necessary permits from the Town of Troy and obtain any other required local, State, or Federal permits and approvals, including but not limited to a County Sanitary Permit, a Wisconsin Department of Natural Resources Chapter 30 Permit, and Army Corps of Engineering approval (if applicable).

3. Prior to commencing construction, the applicants must submit to the Zoning Administrator a construction timeline and contact information for all of the excavators, landscapers, architects, builders, plumbers, and other contractors working on the site.

4. Prior to commencing construction, the applicants shall submit to and have approved by the Zoning Administrator a vegetation management plan showing the restoration of native trees, shrubs, and groundcover in all lands within the OHWM setback, slope preservation zone, and bluffline setback as necessary to make all structures on the property visually inconspicuous from the river and to enhance shoreland habitat.

5. Prior to commencing construction, the applicants shall submit to the Zoning Administrator a Compliance Deposit equal to the

application fee to be held by the Zoning Administrator until all conditions of the approval have been met, at which time the deposit will be refunded in full along with a Certificate of Compliance.

6. Prior to commencing construction, the applicants shall schedule an on-site pre-construction meeting with the Zoning Administrator to:

   - ensure that all pre-construction conditions have been met;
   - ensure that all contractors involved are aware of the conditions of the approval pertinent to the construction and excavation; and
   - ensure that the applicants' [sic] are aware of their roles and responsibilities as the property owners.

7. Prior to commencing construction, temporary fencing shall be installed around the drip lines of all trees around and within the construction site to protect them from damage and soil compaction caused by large equipment during the filling and grading activities and during the construction of the retaining walls. The applicants shall be responsible for maintaining and enhancing the current level of tree cover and adding shrub cover on the site to ensure long-term screening of the house and retaining walls from the St. Croix River as determined necessary by the Zoning Administrator.

8. Prior to commencing construction, the applicants shall submit to the Zoning Administrator certification from a registered professional structural engineer that the fill and the retaining walls will properly support the new home and will withstand pressure from floodwaters and wave action. Specifically, it should address all of the following items as recommended by the Department of Natural Resources:

   - The retaining walls shall be designed to withstand flood pressures, depths, velocities, uplift and impact forces, and other regional flood factors.
   - The retaining walls shall be stable under the most severe conditions and shall withstand saturated soils behind them that will exert significant pressures when the river level is down.
   - Soils behind the walls must be retained. Soils cannot be washed through the walls, and wave action over the top of the walls should not displace any materials.
   - The base of the wall will be subject to significant erosive forces during flooding, especially when the flood waters come to the base or slightly higher and wave action is significant. Undermining of the walls could cause failure of the wall and fill material that is supporting the main structure.

9. During construction, erosion control measures shall be maintained at all times and the smallest amount of bare ground shall be exposed for as short a time as possible. Temporary ground cover such as mulch shall be used and permanent native groundcover shall be planted.

10. All components of the new home – including the roof, trim, siding, and deck – must be earth-tone in color so as to be visually inconspicuous from the river.

11. Within 30 days of completing construction, the applicants shall submit to the Zoning Administrator record drawings of the site prepared by a registered surveyor and photographs of the property as viewed from the St Croix River.

12. Within 30 days of completing construction, the applicants must record an affidavit against the property describing the approved vegetation management plan, storm water management plan, and related maintenance and monitoring requirements with the County Register of Deeds. The intent is to make future owners aware of the responsibilities incurred in maintaining the storm water management areas and screening. The applicant must also submit a copy of the recorded affidavit to the Zoning Administrator.

13. Within 30 days of completing construction, the applicants shall submit to the Zoning Administrator an Elevation Certificate verifying

that the finished construction is above the regional flood elevation (RFE).

14. Any minor change or addition to the project, including but not limited to design of the project, shall require review and approval by the Zoning Administrator prior to making the change or addition. Any major change or addition to the originally approved plan will have to go through the variance and special exception approval process.

15. The applicants shall have one (1) year from the issuance of these approvals to commence construction and two (2) years to complete it. Failure to do so shall result in expiration of the variances and special exception permits, after which time the applicants will be required to secure new variances and special exception permits before starting or completing the project.

16. These conditions may be amended or additional conditions may be added if unanticipated circumstances arise that would affect the health and/or safety of citizens or degrade the natural resources of St. Croix County. Conditions will not be amended or added without proper notice to the applicant and an opportunity for a hearing.

17. Accepting this decision means that the applicant has read, understand, and agree to all conditions of this decision.

ADDENDUM FOR ADDITIONAL VARIANCE

Property Owner: Donna Murr (Et Al) Contractor/ Agent: _____

Property Location: ___ 1/4, ___ 1/4, Sec. ___, T. ___ N.,R. ___ W., Town of Troy

Computer #: ___-___-___-___ Parcel #: 040.1155.80.000 040.1155.85.000

State the nature of your request: Variance from lot requirements under Riverway Ordinance Sec. 17.36 I 4 a 1-3 See attached survey maps Zoning Ordinance Reference _____

Please answer the following questions and provide any additional information, plans, or other materials that you feel addresses these criteria in support of your request (*use backside of this sheet or attach additional paper as necessary*):

1) How does this request relate to the request on your original permit application?

   After the reconstruction of the home is complete, and the home is a conforming structure outside of the floodplain, we wish to redraw our lot lines. Each lot will remain at 1 acre +, but will have less than 1 acre of net project area due to the steep bluff.

2) Explain how literal enforcement of the Ordinance would unreasonably prevent you from using your property for a permitted use and

why the standards in the Ordinance should not apply to your property.

We currently own two adjacent lots which are 1 acre and just over 1 acre each now. However, neither lot currently has 1 acre of project area. Redrawing the lot lines will not create anything different from what we currently own. Also, the new home will be partially built on re-drawn lot & we will be unable to move the home further from the river in the best flood-proof location

3) Describe the unique characteristics of your property with respect to lot size, shape, topography, and other physical limitations that make literal enforcement of the Ordinance impractical. Were any of these limitations created by you or by past property owners?

We have a huge, steep hill in the middle of the property. This prevents 1+ acres of buildable project area on either lot.

4) What other options have you considered and why were they not chosen?

We considered reconstructing the entire home on "Lot B" (see attached survey map), but the best, flood-proof location is further back from the river and further west. This makes the redraw necessary.

5) Explain how granting this variance is consistent with protecting the public interest; in particular, explain how it will impact sensitive public resources and/or adjacent properties.

The redraw will keep the riverway in the area uncrowded as there will be no one putting a dock on the river. It will also allow us the save more trees and make the home less conspicuous from the river.

6) How is granting this variance consistent with the spirit and intent of the Ordinance; in particular, how will it meet the purpose of this zoning district(s) in which your property is located?

We are asking for a variance in much the same manner as many of our St. Croix Cove neighbors have done in the past. Granting this variance will be consistent with other variances approved in the past. The redrawn, as well as the current lots, are the same size or greater than most of our neighbors already.

I attest that the information contained in this addendum is true and correct to the best of my knowledge.

Property Owner
Signature: /s/ Donna L. Murr **Date** 2-6-06

Contractor/
Agent Signature:_____ **Date** _____

Jennifer Shillcox

From: Jon Sonnentag [jsonnetag@authconsulting.com]

Sent: Friday, March 10, 2006 2:54 PM

To: Jennifer Shillcox

Subject: Heaver

Jenny,

Attached are two revised maps that I hope should help with the net project areas (shaded). Please let me know if you have any questions.

Jon Sonnentag
Project Manager

S & N Land Surveying
2920 Enloe Street
Hudson, WI 54016
(715) 386-2007
(715) 381-5338(fax)
jsonnetag@authconsulting.com

MAR 10 2006

ST. CROIX COUNTY

CERTIFIED SURVEY MAP

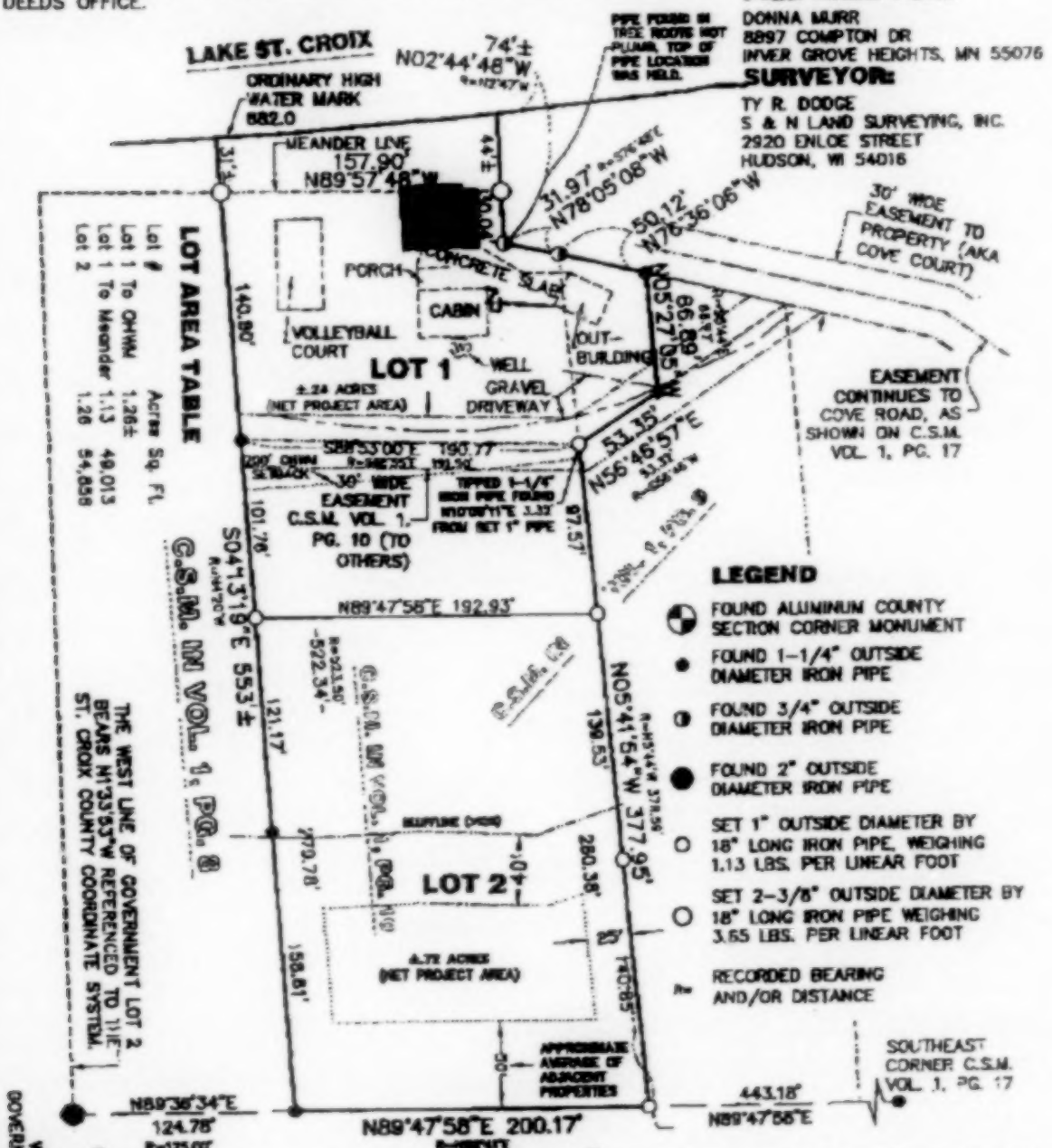
LOCATED IN PART OF GOVERNMENT LOT 2, SECTION 24, T28N, R20W TOWN OF TROY, ST. CROIX COUNTY, WISCONSIN, BEING A CERTIFIED SURVEY MAP IN VOLUME 1, PAGE 10 AND PART OF A CERTIFIED SURVEY MAP IN VOLUME 1, PAGE 9 AND PART OF A CERTIFIED SURVEY MAP IN VOLUME 1, PAGE 17, RECORDED IN THE ST. CROIX COUNTY REGISTER OF DEEDS OFFICE.

PREPARED FOR:

DONNA MURR
8897 COMPTON DR
INVER GROVE HEIGHTS, MN 55076

SURVEYOR:

TY R. DODGE
S & N LAND SURVEYING, INC.
2920 ENLOE STREET
HUDSON, WI 54016



LAKE AREA TABLE

Lot #	Acres	Sq. Ft.
Lot 1 To OHWM	1.26±	
Lot 1 To Meander	1.13	49,013
Lot 2	1.26	54,859

LEGEND

- FOUND ALUMINUM COUNTY SECTION CORNER MONUMENT
- FOUND 1-1/4" OUTSIDE DIAMETER IRON PIPE
- FOUND 3/4" OUTSIDE DIAMETER IRON PIPE
- FOUND 2" OUTSIDE DIAMETER IRON PIPE
- SET 1" OUTSIDE DIAMETER BY 18" LONG IRON PIPE, WEIGHING 1.13 LBS. PER LINEAR FOOT
- SET 2-3/8" OUTSIDE DIAMETER BY 18" LONG IRON PIPE WEIGHING 3.65 LBS. PER LINEAR FOOT
- (Rec) RECORDED BEARING AND/OR DISTANCE

EACH PARCEL SHOWN ON THIS MAP IS SUBJECT TO STATE, COUNTY AND TOWNSHIP LAWS, RULES AND REGULATIONS (I.E., WETLANDS, MINIMUM LOT SIZE, ACCESS TO PARCEL, ETC.) BEFORE PURCHASING OR DEVELOPING ANY PARCEL CONTACT THE ST. CROIX COUNTY ZONING OFFICE AND THE TOWN OF TROY FOR ADVICE.

THIS INSTRUMENT DRAFTED BY: WILLIAM KANE
JOB NO. 6468-01 DATE: 02/03/2006 REVISED 03/06/06

APPENDIX G

CIRCUIT COURT

STATE OF WISCONSIN ST. CROIX COUNTY

Joseph P. Murr,
Michael W. Murr,
Donna J. Murr and
Peggy M. Heaver

Petitioners,

vs.

State of Wisconsin and
St. Croix County,

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed Dec. 26, 2013)

Case: 12 CV 258

INTRODUCTION

In a memorandum decision and order issued October 31, 2013, the Court granted Respondent's Motion for Summary Judgment holding the Murrs' claim was barred by the applicable statute of limitations and that the St. Croix County Board of Adjustments ("Board") decision to deny the Murrs a variance was not a regulatory taking. Petitioners filed a Motion for Reconsideration arguing the Court erroneously concluded the Murr's claim is time barred and that there are material issues of fact concerning the economic and beneficial uses available for Lot E. (*See* Pet'r's. Br. at 1,4). The State and St. Croix County oppose the Motion because the Murrs have not shown any circumstances entitling them to relief under Wis. Stat. § 806.07; that the claim is time barred because the Murrs never had a vested interest; and because the Court properly concluded the

entire Murr property has not been deprived of all or substantially all beneficial use. (*See* State's Br.) (*See* St. Croix Cnty Br.)

DISCUSSION

Having reviewed the arguments presented, the Court finds Petitioners have not submitted newly discovered evidence or established a manifest error of law or fact. *See Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 275 Wis.2d 397, 416, 685 N.W.2d 853, 862 (Wis. Ct. App. 2004) ("To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact").

Petitioners' argument that their claim is not time barred merely rehashes the arguments raised in opposition to summary judgment. This Court rejected this very argument in its original decision and stands by its reasoning here.

Further, as already explained by this Court, even assuming Petitioners [sic] claim is not time barred, summary judgment was appropriate because the denial of the variance was not a regulatory taking. Contrary to Petitioners' arguments, the property must be evaluated as a whole. *See Zealy v. City of Waukesha*, 201 Wis.2d 365, 376-77 (Wis. Ct. App. 1995) ("[c]ases of the United States Supreme Court do not support the proposition that a *contiguous property* should be divided into discrete segments for purposes of evaluating a takings claim.") (emphasis added). More importantly,

to establish a regulatory taking government conduct must deprive a landowner of all or substantially all practical uses of the property. *Bettendorf v. St. Croix Cnty.*, 631 F.2d 421, 424 (7th Cir. 2011) (citing *Eternalist Found., Inc. v. City of Platteville*, 225 Wis.2d 759, 773, 593 N.W.2d 84 (Wis. 1999)). *See also R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 15, 244 Wis.2d 497, 628 N.W.2d 781. ("[w]e have in Wisconsin interpreted this latter category to include regulatory actions that deny the landowner all or substantially all practical uses of a property.") (internal quotations omitted). Petitioner's [sic] do not dispute the property has some practical uses and no genuine issue of material fact was created with respect to the suggested uses of the property as a whole.

Petitioners' [sic] correctly argue that the Court of Appeals did not decide whether the lots are formally merged into one lot (*See* Pet'r's Br. at 8). However, the Court of Appeals and the Murrs acknowledged the two parcels as "contiguous." *See Murr v. Board of Adjustment*, 2011 WI App 29, ¶¶ 2, 5, 332 Wis.2d 172, 796 N.W.2d 837. As such, this Court analyzed the takings claim of the "contiguous" property, as a whole, under the standards provided in *Zealy*.

Petitioners attempt to create a genuine issue of material fact with respect to the appraisals; however, in light of this Court's obligation to analyze the impact on the property as a whole, reliance on appraisal values that consider only a portion of the Murrs' property do not create a genuine issue of material fact. Further, Roger Koski expressly acknowledged he did not have

fair market values for the property; he only has assessment data. (*See* Koski Dep. 13: 13-18). Petitioners' [sic] have not cited legal authority that would create a genuine issue of material fact, specifically where the person testifying, Koski, stated he had no information as to the effect on fair market value.

CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that Petitioner's [sic] Motion for reconsideration is **DENIED**.

BY THE COURT:

Dated this 26th day of December 2013.

/s/ Scott Needham
Honorable Scott Needham
St. Croix County Circuit Court Judge
Branch III